"Oversight of the Financial Stability Oversight Council: Due Process and Transparency in Non-Bank SIFI Designations"

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Chairman Duffy, Ranking Member Green, and other members of the Subcommittee, thank you for inviting me to testify today on a matter of such fundamental importance to the country: its free and fair markets, and its principles of constitutional government. The Financial Stability Oversight Council poses significant challenges to both.

When President Obama signed the Dodd-Frank Act into law five years ago,[2] he said that "our financial system only works—our market is only free—when there are clear rules and basic safeguards that prevent abuse, that check excess, that ensure that it is more profitable to play by the rules than to game the system."[3] I agree wholeheartedly with his sentiment—both as it applies to private actors, and as it applies to government officials who regulate them. But Dodd-Frank's creation

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

[3] "Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act" (July 21, 2010), *at* https://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act.

of the Financial Stability Oversight Council (FSOC) does not achieve those aims. If anything, it undermines them.

My prepared statement will offer three basic points: *First*, in structuring the FSOC, Dodd-Frank undermined constitutional governance by delegating overbroad powers to the FSOC while simultaneously removing or weakening key checks and balances that would guide and limit the exercise of those powers. *Second*, the FSOC's operations thus far confirm the dangers inherent in that structure. And *third*, in evaluating those problems, it is important to keep in mind that the FSOC's affect more than just the financial institutions regulated by the FSOC; they affect other market actors, and the public at large, who are denied a full and fair opportunity to participate in this momentous regulatory framework.

I. In creating the FSOC, Dodd-Frank delegated immense power to regulators but weakened crucial checks and balances that would guide and limit their use of that power.

The character of any regulatory agency is defined first and foremost by two fundamental characteristics: the amount of power that Congress delegates to the agency, and the agency's degree of structural "independence" or "insulation" from oversight by the President, Congress, and the courts. Each of these considerations is important in and of itself—a statute may be unconstitutional if it delegates too much power to an agency,[4] or if it gives the agency too much structural

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[4] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (explaining constitutional requirement that Congress specify an "intelligible principle" to guide and limit agency discretion); *see also Util. Air Reg. Group v. EPA*, 134 S. Ct. 2427 (2014) (rejecting an agency's interpretation of statute that would have given the

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independence.[5] But even more important is the way that these two characteristics interact with one another: as Congress delegates broader powers to an agency or official, it becomes all the more important that the agency be subjected to the checks and balances of congressional, presidential, and judicial oversight.[6]

Unfortunately, Dodd-Frank's Title I accomplished precisely the opposite. It vested the newly created FSOC with effectively open-ended power, while *weakening* checks and balances instead of increasing them.[7]

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agency effectively unlimited discretion); John Hart Ely, *Democracy and Distrust* 132 (1980) (explaining that the nondelegation doctrine preserves the "accountability that is crucial to the intelligible functioning of a democratic republic.").

[5] *See*, *e.g.*, *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138 (2010) (holding unconstitutional a provision of the Sarbanes-Oxley Act that attempted to give the new Public Company Accounting Oversight Board a double-layer of structural independence from presidential accountability).

[6] *See*, *e.g.*, *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (holding that the Independent Counsel was not unconstitutional because, *inter alia*, the office had only "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority"); *see also Free Enter. Fund*, 561 U.S. at 496 ("This novel structure does not merely add to the Board's independence, but transforms it."); *Ass'n of Am. R.R. v. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013) ("just because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute"), *rev'd on other grounds*, 136 S. Ct. 1225 (2015); *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015) (refusing to grant any judicial deference to the agency's interpretation of the Affordable Care Act, because the issue at hand was of such immense political and economic significance the Congress could not be presumed to have delegated it to agency).

[7] I was co-counsel to plaintiffs challenging the FSOC's constitutionality. But the merits of that claim were not reached by the court, which dismissed the claim for lack of standing. *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015). I remain of counsel to the community bank and other plaintiffs challenging the CFPB.

When Dodd-Frank empowered the FSOC to designate nonbank financial institutions as "systemically important" (*i.e.*, "SIFIs"), it did so in literally open-ended terms. Section 113(a)(1) of the Act sets two basic standards for determining whether a nonbank financial institution is a "SIFI,"[8] and lists ten "considerations" that the FSOC "shall consider" in making those determinations.[9] But the Act concludes that list with an item allowing the FSOC to base its decision on not just those considerations but also "*any other* risk related factors that the *Council deems appropriate*."[10] Thus, the statute is completely malleable—as demonstrated by the FSOC's decision to unilaterally re-write the statute into a set of three "channels" and six "categories" of the FSOC's own making.[11]

Given the breadth of power delegated to the FSOC, the Constitution's structural checks and balances against FSOC overreach were all the more important. But instead of fortifying those checks and balances, Dodd-Frank weakened them.

Most significantly, Dodd-Frank made the FSOC independent from Congress's appropriations power, thus freeing the Council from full, meaningful congressional

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[8] Specifically, whether (1) "material financial distress at the U.S. nonbank financial company," or (2) its "nature, scope, size, scale, concentration, interconnectedness, or mix of the activities," "could pose a threat to the financial stability of the United States." 12 U.S.C. § 5323(a)(1).

[9] *Id.* § 5323(a)(2).

[10] *Id.* §5323(a)(2)(K) (emphasis added).

[11] FSOC, Final Rule and Interpretive Guidance, *Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies*, 77 Fed. Reg. 21637, 21657–60 (2012).

oversight. In Federalist 58, James Madison wrote that Congress's "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, . . . for carrying into effect every just and salutary measure," and for "reducing . . . all the overgrown prerogatives of the other branches of the government."[12] But the FSOC does not face Congress's power of the purse, because Dodd-Frank provides for all of FSOC's expenses to be paid by the Office of Financial Research, which in turn is funded not by appropriations but by fees charged to the industry.[13] (For this reason, it is crucial that Congress enact H.R. 3340 or similar legislation removing the FSOC's automatic funding and requiring it to obtain appropriations from Congress.)

In addition to the FSOC's independence from Congress, Dodd-Frank also purports to relax judicial review of the FSOC's actions. Specifically, when a court hears an appeal of the FSOC's nonbank SIFI designations, judicial review "shall be limited to whether the final determination made under this section was arbitrary

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[12] *See also*, *e.g.*, *Noel Canning v. NLRB*, 705 F.3d 490, (D.C. Cir. 2013) ("The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist 'the overgrown prerogatives of the other branches of government.'"), *aff'd*, 134 S. Ct. 2550 (2014); S. Comm. on Gov't Operations, 95th Cong. 1st Sess., 2 *Study on Federal Regulatory Agencies* 42 (1977) ("The appropriations process is the *most potent form* of congressional oversight, particularly with regard to the federal regulatory agencies." (emphasis added)).

[13] *See* Dodd-Frank §§ 118 & 155; 12 U.S.C. §§ 5328 & 5345 (*e.g.*, "Funds obtained by, transferred to, or credited to the Financial Research Fund shall not be construed to be Government funds or appropriated moneys.").

and capricious."[14] That provision, if read literally, might be construed by the FSOC or a judge as prohibiting the court from applying the other normal standards of judicial review of agency action set forth in the Administrative Procedure Act (APA) and applicable precedents, such as judicial review of whether the agency's decision is "in accordance with law."[15]

The APA was enacted to serve as nothing less than the "bill of rights" for all "Americans whose affairs are controlled or regulated" by "agencies of the Federal Government"—to "provide guaranties of due process in administrative procedure."[16] Congress should leave no doubt that those legal protections apply in full to the FSOC. (Accordingly I urge Congress to amend Dodd-Frank to delete Section 113(h)'s narrow provision for judicial review, and subject the FSOC to the general standards of review under the Administrative Procedure Act.)

In addition to removing or weakening Congress's and the courts' checks and balances against FSOC overreach, Dodd-Frank also structures the FSOC in such a way that lacks the normal "internal" checks and balances of independent regulatory commissions such as the Securities and Exchange Commission, Commodity Futures Trading Commission, and other expert regulatory agencies. Such agencies traditionally include a near-balance of members from both political parties, in order to ensure that the agency undertakes its work through deliberation, ultimately

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

[15] 5 U.S.C. § 706(2)(A).

[16] ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. Doc. No. 79-248, 2d Sess., p. 298 (1946) (statement of APA sponsor Sen. McCarran).

producing not just an agency decision but also (when members disagree) published opinions from dissenting members.[17] But the FSOC offers little or no such bipartisan deliberation, because it predominantly comprises agency heads appointed by the President and serving at his pleasure or, in the case of the FSOC's members from the SEC and other independent commissions, officers elevated to the commission's chair in the President's sole discretion.[18]

Indeed, Dodd-Frank gratuitously disregarded the expertise and deliberation available in the SEC, CFTC, and other independent member agencies, by seating only the commissions' respective chairmen as FSOC members, when it could have instead assigned FSOC membership to each respective independent commission acting as a commission—that is, to require, *e.g.*, the entire SEC to vote on FSOC matters rather than just the SEC's president-selected chairman.[19]

Having vested the FSOC with effectively open-ended powers, freed it from Congress's power of the purse, limited its exposure to judicial review, and

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[17] *See*, *e.g.*, *Humphrey's Ex'r v. U.S.*, 295 U.S. 602, 624 (1935) (describing a similar commission, the FTC, as being "neither political nor executive, but predominantly quasi judicial and quasi legislative . . . [I]ts members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'").

[18] *See* Dodd-Frank § 111(b); 12 U.S.C. § 5321(b). There are exceptions. The director of the Consumer Financial Protection Bureau, an FSOC member, serves a five-year term and keeps the office until his successor is successfully appointed. 12 U.S.C. § 5491(c). Likewise, the Chairman of the Federal Reserve, another FSOC member, serves a staggered four-year term on the Fed. *Id.* § 242.

[19] *Cf. Free Enter. Fund*, 561 U.S. at 512–13 ("As a constitutional matter, we see no reason why a multimember body may not be the 'Head' of a 'Department' that it governs." (brackets omitted)).

constructed it in a way that minimizes internal deliberations, scholars of the administrative state might assume that the FSOC would construe its statutory boundaries as broadly as possible and exercise its powers with little or no process due to affected parties.

They would assume correctly.

II. FSOC's operations confirm the dangers inherent in its structure.

The courts place great trust in checks and balances, especially Congress's power of the purse, to restrain agency excess.[20] The FSOC's record highlights the power of such checks and balances—because in their absence, the FSOC has expanded its power and minimized the rights afforded to private parties.

1. First and foremost, the FSOC's approach to designating nonbank SIFIs ignores even the limited requirements placed upon it by Title I of the Dodd-Frank Act. Specifically, the Act's Section 113(a)(1) empowers the FSOC to designate a US nonbank SIFI if the FSOC "determines that material financial distress" at that company *could* pose a threat to the financial stability of the United States."[21] Indeed, in initially interpreting that provision the FSOC conceded that designating a SIFI on that basis would turn in part on whether the company is "more likely to be more vulnerable to financial distress."[22] But in making its nonbank SIFI determinations, the FSOC subsequently declared that that it is *not* required to

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[20] *See*, *e.g.*, *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *Pub. Citizen v. NHTSA*, 489 F.3d 1279, 1295 (D.C. Cir. 2007) (citing *Laird*).

[21] 12 U.S.C. § 5323(a)(1) (emphasis added).

[22] 77 Fed. Reg. at 21658.

consider the designated company's actual vulnerability to material financial distress—or, as it argued in a recent court filing, the FSOC reads Dodd-Frank as leaving it entirely free "*not* to address the likelihood of the company's distress" (emphasis in original).[23]

The FSOC's assumption of power to impose immense regulatory burdens on insurance companies not previously subject to such regulation, without having to show that such regulatory burdens are necessary to remediate an actual risk of public harm, is precisely the sort of regulatory approach that the Supreme Court rejects. In the *Benzene Case* (1980), the Court urged that if a statute were read to allow agencies to impose vast regulatory burdens without a showing of such "significant" risk to the public, then the statute "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional" under the Court's seminal nondelegation doctrine precedents. Thus, the Court held, a "construction of the statute that avoids this kind of open-ended grant should certainly be favored."[24]

More recently, when the Court this year struck down the EPA's immensely burdensome mercury rule for failing to consider its disproportionate cost-benefit ratio, the Court stressed that "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few

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[23] *See* Reply Brief of FSOC at p. 39, in *MetLife, Inc. v. FSOC*, Case No. 1:15-cv-00045-RMC (D.D.C. filed Sept. 30, 2015) (redacted version).

[24] *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607, 646 (1980). Justice Rehnquist wrote separately but agreed on this point. *Id.* at 683.

dollars" in benefits.[25] The FSOC, construing its statute as allowing it to impose immense regulatory burdens without considering the actual real-world need for such regulations, simply ignores the Court's repeated warnings against gratuitous regulation by self-aggrandizing regulators.[26]

Ultimately, the law's bedrock prohibition against "arbitrary and capricious" agency action requires the FSOC to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[27] In failing to demonstrate precisely how its SIFI designations actually guard against the risk of systemic financial harm—indeed, in making such designations even over the vocal objections of the FSOC's own member with specific subject-matter expertise[28]—the FSOC fails to satisfy even that low standard of review.

2. The FSOC's lack of checks and balances also is evidenced by the agency's denial of basic due process rights to designated companies. In one SIFI

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[25] *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

[26] *See generally* C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 Geo. Mason L. Rev. 619 (2015).

[27] *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[28] *See* FSOC SIFI Designation of Prudential, Inc., *Views of the Council's Independent Member Having Insurance Expertise* (Sept. 19, 2013), *at* http://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/September 19 2013 Notational Vote.pdf; FSOC SIFI Designation of MetLife, Inc., *Views of the Council's Independent Member Having Insurance Expertise* (Dec. 18, 2014), *at* http://www.treasury.gov/initiatives/fsoc/designations/Documents/Dissenting and Minority Views.pdf.

designation proceeding currently on appeal in federal court, the FSOC refused to give the company access to the full record underlying the FSOC's decision.[29]

The FSOC's reliance on secret evidence, for which the parties subject to its proceedings are denied a meaningful opportunity to respond, violates the fundamental right to due process protected by the Fifth Amendment and the Administrative Procedure Act. As the D.C. Circuit reiterated last year, in striking down the secretive action of another interagency body similar to FSOC, "due process requires, at the least, that an affected party be informed of the official action, be given access to the unclassified evidence on which the official actor relied and be afforded an opportunity to rebut that evidence."[30] While the courts recognize a limited exception for cases of *classified* information when nondisclosure is justified by "the Government's 'compelling' interest in national security,"[31] that exception cannot be allowed to swallow the rule—namely, the rule that "disclosure of unclassified evidence is required by the Due Process Clause,"[32] a "fundamental norm of due process clause jurisprudence."[33]

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[29] *See* Final Brief of MetLife, Inc., at p. 62–67, in *MetLife, Inc. v. FSOC*, Case No. 1:15-cv-00045-RMC (D.D.C. filed Sept. 30, 2015) (redacted version).

[30] *Ralls Corp. v. CFIUS*, 758 F.3d 296, 319 (D.C. Cir. 2014).

[31] *Id.* at 318–19 (citing *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 207 (D.C. Cir. 2001)).

[32] *Id.* at 320.

[33] *Nat'l Council of Resistance of Iran*, 251 F.3d at 205 ("the fundamental norm of due process clause jurisprudence requires that before the government can constitutionally deprive a person of the protected liberty or property interest, it must afford him notice and hearing").

The FSOC's unconstitutional secrecy harms more than just the companies that it regulates. It also harms the public, which has the right and the need to know. As Justice Louis Brandeis noted, "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[34] This is no less true in the public's policing of the regulatory police themselves.

3. Due process concerns are also raised by allegations that the FSOC's designations have been influenced heavily by the decisions of the international Financial Stability Board (FSB) to designated certain companies as "global" SIFIs (or "G-SIFIs"), which were then followed by the FSOC's own designations.[35] While the courts recognize that regulators often approach a policy issue with preconceived notions of the public interest, such agency latitude is not unlimited: when an agency is shown clearly to have "an unalterably closed mind on matters critical to the disposition of the proceeding," then it has violated the Due Process Clause.[36]

To be clear, this is an *extremely* high bar for litigants to clear, and it has not yet been demonstrated with respect to the FSOC's designations. But given that the FSOC's proceedings have been extremely opaque in this respect—the agency has blocked inquiries into the influence of FSB's G-SIFI designations on its own similar

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[34] Louis D. Brandeis, *Other People's Money* 92 (1914).

[35] *See*, *e.g.*, Peter J. Wallison, AEI, *The Financial Stability Oversight Council and the Financial Stability Board: Issues in International Regulation*, Testimony Before the House Financial Services Subcommittee on Oversight and Investigations (Mar. 5, 2014), *at* http://financialservices.house.gov/uploadedfiles/hhrg-113-ba09-wstate-pwallison-20140305.pdf.

[36] *See*, *e.g.*, *Air Trans. Ass'n of Am. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011).

SIFI designations[37]—it is incumbent upon Congress to investigate whether the FSOC is approaching these momentous regulatory decisions with the open minds that constitutional due process requires.

4. Finally, the FSOC's lack of constitutional checks and balances is seen not just in the way that it asserts SIFI regulatory authority over nonbank financial companies, but also in the way that it ceases such regulatory authority—or, more specifically, in the way that it *refuses* to cease such regulatory authority.

The stated purpose of Dodd-Frank's Title I was to solve the problem of systemic risk, not simply to give federal regulators perpetual jurisdiction over regulated parties. Title I created the FSOC "to *end* 'too big to fail,'"[38] not to provide a full-employment program for regulators.

Accordingly, so long as the FSOC exists to solve too-big-to-fail, the aim of every SIFI designation should be to identify and *remediate* situations presenting systemic risk—or, as the FSOC explained in its original rulemaking, to actually "*address* any potential risks to U.S. financial stability posed by these companies."[39] But so far, the FSOC has not given SIFIs or the public a roadmap to the designated companies' eventual off-ramp from SIFI status.[40]

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[37] *See* MetLife Brief, *supra* note 29, at p. 11.

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

[39] 77 Fed. Reg. at 21637 (emphasis added).

[40] *See*, *e.g.*, Lucy Ren, *Insurers, Investment Managers Press for 'Off-Ramp' From SIFI Designation*, MARKETWATCH (July 8, 2015), *at* http://www.marketwatch.com/story/insurers-investment-managers-press-for-off-ramp-from-sifi-designation-2015-07-08; Evan Weinberger, *Fed Gives No Clues on SIFI Off-Ramp in GE Capital Rule*,

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There are strong institutional reasons for the FSOC not to provide such an off-ramp, to focus more on perpetual regulation than outright de-risking, thus keeping regulated parties (and the public) driving in regulatory circles instead of steering toward an off-ramp. In addition to maintaining strong regulatory power and leverage over the regulated parties, perpetual regulation also avoids giving any designated SIFI a clean bill of health, for which regulators would be held accountable in the event of subsequent financial turbulence. But the longer that FSOC-designated companies retain SIFI status instead of being un-SIFI'd, the more the public, and the markets, will be justified in seeing SIFI designations as the official formalization of too-big-to-fail status.

Ultimately, the maintenance of perpetual SIFI status, instead of the achievement of actual de-risking, threatens to perpetuate the very conditions that former Federal Reserve Chairman Bernanke warned against in early 2010:

> [T]he existence of too-big-to-fail firms also imposes heavy costs on our financial system even in more placid times. Perhaps most important, if a firm is publicly perceived as too big, or interconnected, or systemically critical for the authorities to permit its failure, its creditors and counterparties have less incentive to evaluate the quality of the firm's business model, its management, and its risk-taking behavior. As a result, such firms face limited market discipline, allowing them to obtain funding on better terms than the quality or

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LAW360 (July 21, 2015), *at* http://www.law360.com/articles/681551/fed-gives-no-clues-on-sifi-off-ramp-in-ge-capital-rule.

> riskiness of their business would merit and giving them incentives to take on excessive risks.[41]

If Title I created the FSOC to "end" too big to fail, then the FSOC should actually pursue that aim, and explain to the public how it intends to do so.

III. Dodd-Frank denies other market actors, and the public at large, the opportunity to participate fully and meaningfully in this momentous regulatory framework.

The foregoing discussion focuses primarily on the rights of companies facing the possibility of being designated nonbank SIFIs by the FSOC. But it would be a great mistake to presume that they are the *only* ones with interests at stake in the FSOC's decisions. Rather, those decisions directly affect other markets actors, including a SIFI's competitors, and the American people generally.

It has long been recognized that if the government sees a company as "too big to fail" then markets will treat that company as less risky—since the government is trusted to intercede in time of crisis—distorting market prices and disfavoring competitors without a similar governmental imprimatur. In 2011, for example, Moody's estimated that for U.S. companies the "too big to fail" cost-of-capital advantage was 23 basis points before the financial crisis and 56 basis points thereafter, worth billions of dollars.[42] Of course, many companies facing the

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[41] "Preserving a Central Role for Community Banking" (Mar. 20, 2010), *at* http://www.federalreserve.gov/newsevents/speech/bernanke20100320a.htm.

[42] Zan Li et al., *Quantifying the Value of Implicit Government Guarantees for Large Financial Institutions* (2011), *at* http://www.moodysanalytics.com/~/media/Insight/Quantitative-Research/Credit-Valuation/2011/2011-14-01-Quantifying-the-Value-of-Implicit-Government-Guarantees-for-Large-Financial-Institutions-20110114.pdf; *see also* Joseph Noss & Rhiannon Sowerbutts, Bank of England, *The Implicit*

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possibility of designation would find even such a cost-of-capital advantage to be insufficient consolation from the extra costs of new federal regulation. But some, especially those already subject to extensive federal regulation, might find the subsidy well worth the cost. In 2013, Connecticut's Insurance Commissioner told an international audience that SIFI designations are "really good" for the designated company, because it's thus "potentially too big to fail, so the government is not going to let this company go."[43] This might explain why the first three nonbank SIFIs' stock prices *increased* upon news of their FSOC designations.[44] It might also explain recent statements by A.I.G.'s chief executive, who indicated that "he found SIFI status less objectionable and thought A.I.G. could work with its Fed regulators."[45]

As former Federal Reserve Chairman Bernanke observed in his aforementioned 2010 speech, "[h]aving institutions that are too big to fail also creates competitive inequities that may prevent our most productive and innovative

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Subsidy of Banks (May 2012), *at* http://www.bankofengland.co.uk/financialstability/Documents/fpc/fspapers/fs_paper15.pdf.

[43] Gavin Souter, *Stability, Higher Costs Seen in Systemic Designation for Insurers*, BUSINESS INS. (June 19, 2013), *at* http://www.businessinsurance.com/article/20130619/NEWS04/130619774/stability-higher-costs-seen-in-systemic-designation-for-insurers.

[44] Ian Katz & Zachary Tracer, *AIG, Prudential Named Systemically Important by Panel*, Bloomberg (June 4, 2013), *at* http://www.bloomberg.com/news/articles/2013-06-03/u-s-regulators-vote-to-label-some-non-banks-systemically-risky.

[45] Mary Williams Walsh, *A.I.G. Considers How to Act With SIFI Tag*, N.Y. TIMES (May 1, 2015), *at* http://www.nytimes.com/2015/05/02/business/dealbook/aig-considers-how-to-act-with-sifi-tag.html.

firms," such as the community banks he was addressing, "from prospering."[46] Given that FSOC's SIFI designations might in some cases serve as a net *subsidy* rather than a net burden, those designations must be susceptible to judicial review by competitors and other affected companies. But Dodd-Frank does not provide for judicial review by other affected parties.[47] Congress should fix this as soon as possible, by amending the FSOC's judicial review provision to expressly allow appeals of FSOC designations by other affected parties.

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Ultimately, the FSOC's faults were of Congress's own making. The FSOC, like all agencies, is a "creature[] of Congress," and thus had "literally . . . no power to act . . . unless and until Congress confer[red] power upon it."[48] The fact that the Dodd-Frank Congress eagerly gave such power and structural independence to the FSOC is no answer, for a particular Congress, like a particular President, "might find advantages in tying [its] own hands.[49] But just as the separation of powers does not depend on the views of individual Presidents," nor does it depend on the views of individual Congresses.[50]

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[46] *See* note 41, *supra*.

[47] *See* Dodd-Frank § 113(h); 12 U.S.C. § 5323(h) (providing judicial review only for the designated nonbank financial company).

[48] *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, C.J., dissenting) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

[49] *Free Enter. Fund*, 561 U.S. at 497.

[50] *Id.*

So it falls to the current Congress to correct these problems—to reform the FSOC's structure by restoring constitutional checks and balances, and in turn to ensure that the FSOC respects fundamental rights of due process and transparency.

Again, I thank the subcommittee for the opportunity to discuss these matters of crucial importance to our markets and to the rule of law that undergirds them.