

## II. *Designation and De-designation of Systemically Important Financial Institutions*

### A. Introduction

After the financial crisis of 2008, Congress responded with the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).<sup>1</sup> Dodd-Frank revamped the regulation of the financial sector in the United States in a number of ways.<sup>2</sup> One of the most important changes was the creation of the Financial Stability Oversight Council (FSOC).<sup>3</sup> FSOC is an interagency group made up of the heads of the U.S. financial regulators and is led by the Secretary of the Treasury (Treasury Secretary).<sup>4</sup> FSOC's purpose is to coordinate the regulators' efforts in promoting the stability of the financial system.<sup>5</sup> The existence of FSOC itself has been controversial, but one of its most controversial powers has been its ability to designate nonbanking institutions as systemically important financial institutions (SIFIs) and subject them to more stringent prudential regulation under the oversight of the Board of Governors of the Federal Reserve (Fed).<sup>6</sup>

Proponents of this power argue that it is necessary in order to regulate the risks posed by “shadow banking,” which consists of banking activities carried out by entities that do not come under federal regulation.<sup>7</sup> Opponents argue that this is unnecessary and over burdensome to the nonbank institutions that are labeled as SIFIs.<sup>8</sup>

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<sup>1</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code); Jeremy C. Kress, *The Last SIFI: The Unwise and Illegal Deregulation of Prudential Financial*, 71 STAN. L. REV. ONLINE 171, 172 (2018).

<sup>2</sup> George W. Madison et al., *FSOC Designation Treasury Report: A Fundamental Shift*, DAILY BLOOMBERG BNA: DAILY REP. FOR EXECUTIVES (Jan. 18, 2018).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (stating the composition of FSOC).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (“[I]t is important to note that numerous critics—including many members of Congress—have pushed for a wholesale repeal of the FSOC designation authority.”).

<sup>7</sup> *Id.* (discussing how the formation of FSOC was in part a response to the growing concern over shadow banking).

<sup>8</sup> Kress, *supra* note 1, at 173 (discussing the view that SIFI designation creates unnecessary regulation at a high cost).

In 2013 and 2014, FSOC designated four companies as SIFIs: Prudential Financial, Inc. (Prudential); American International Group (AIG); General Electric Capital Corporation (GE Capital); MetLife, Inc. (MetLife).<sup>9</sup> Since then all four have shed their SIFI labels.<sup>10</sup> The de-designation of Prudential came last, and came after the Department of the Treasury (Treasury Department) indicated they would change the process for making SIFI designations.<sup>11</sup>

This article provides an overview of the SIFI designation and de-designation decisions and how the Treasury Department under the Trump Administration has changed the designation. Part B overviews the legal framework for SIFI designations put in place by Dodd-Frank after the financial crisis of 2008. Part C examines the initial process FSOC used to determine which, if any, nonbank financial institutions should be designated SIFIs. Part D describes FSOC's initial designations of AIG, GE Capital, MetLife, and Prudential. Part E discusses the initial de-designations of AIG and GE Capital. Part F looks at the changes in FSOC's approach to SIFI designations during the Trump Administration, and the resulting de-designations of MetLife and Prudential. Part G summarizes some of the implications these changes will have on the future of SIFI designations.

## **B. Relevant Dodd-Frank Provisions**

Under Dodd-Frank, Congress directed FSOC to designate a nonbank financial institution a SIFI if it determined that “financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States.”<sup>12</sup> For FSOC to designate a nonbank entity a SIFI, two-thirds of the members of FSOC—including the Treasury Secretary—must vote in favor of the designation.<sup>13</sup> If

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<sup>9</sup> *Id.* (listing the firms that FSOC designated as SIFIs).

<sup>10</sup> *Id.* at 174–75 (stating that all four companies have since had their SIFI designations removed).

<sup>11</sup> *Id.* at 174 (“Trump selected nominees drawn from the financial sector and conservative legal circles, which had long criticized nonbank SIFI designations as burdensome and inequitable.”)

<sup>12</sup> 12 U.S.C. § 5323(a)(1) (2012).

<sup>13</sup> *Id.* (“The Council, on a nondelegable basis and by a vote of not fewer than 2/3 of the voting members then serving, including an affirmative vote by the

FSOC designates a nonbank entity as a SIFI then the nonbank entity will be placed under Fed regulation.<sup>14</sup> Dodd-Frank requires the Fed to promulgate prudential standards for these entities that, “are more stringent than the standards and requirements applicable to nonbank financial companies and bank holding companies,” that are not supervised by the Fed.<sup>15</sup> Among others, these higher standards include larger capital and liquidity requirements, stricter leverage limits, and increased risk management.<sup>16</sup> Entities that FSOC is considering designating a SIFI can appeal the designation through a hearing with FSOC.<sup>17</sup> If FSOC denies the appeal, then the entity can bring an action to prevent the designation in a United States district court.<sup>18</sup> FSOC can also de-designate a nonbank SIFI and remove Fed supervision through a two-thirds vote, including the Treasury Secretary.<sup>19</sup>

### C. FSOC’s Original Process

After FSOC was established, it set out to determine how it would decide which, if any, nonbank entities should be designated SIFIs.<sup>20</sup> FSOC developed a three-step process.<sup>21</sup> The first step applied quantitative thresholds to nonbank entities in order to narrow the pool

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Chairperson, may determine that a U.S. nonbank financial company shall be supervised by the Board of Governors . . . .”); *see* Madison et al., *supra* note 2.

<sup>14</sup> 12 U.S.C. § 5365(a)(1) (2010) (“[T]he Board of Governors shall, on its own or pursuant to recommendations by the Council under section 5325 of this title, establish prudential standards for nonbank financial companies supervised by the Board of Governors and bank holding companies with total consolidated assets equal to or greater than \$250,000,000,000 . . . .”).

<sup>15</sup> *Id.* § 5365(a)(1)(A).

<sup>16</sup> *Id.* § 5365(b)(1)(A).

<sup>17</sup> *Id.* § 5323(e)(2) (“[T]he nonbank financial company may request, in writing, an opportunity for a written or oral hearing before the Council to contest the proposed determination.”).

<sup>18</sup> *Id.* § 5323(h).

<sup>19</sup> *Id.* § 5323(d)(2).

<sup>20</sup> Kress, *supra* note 1, at 173 (“At least initially, the FSOC embraced its mission to identify nonbank SIFIs. The Council promulgated, through notice-and-comment rulemaking, formal procedures for evaluating a nonbank’s systemic importance.”).

<sup>21</sup> Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637, 21,641–46 (Apr. 11, 2012) (to be codified at 12 C.F.R. pt. 1320) (describing the three-stage process for SIFI designations developed by FSOC).

of possible designees.<sup>22</sup> If an entity surpassed the consolidated assets threshold, which was \$50, billion and any one of the additional thresholds, then the entity would be considered under step two.<sup>23</sup> There are six thresholds, including the consolidated assets threshold.<sup>24</sup>

If a firm moves on to stage two, FSOC will conduct a “robust analysis of the potential threat that each of those nonbank financial companies could pose to U.S. financial stability.”<sup>25</sup> Firms are not notified if they are under review in stage two, and FSOC conducts the stage two review primarily through information obtained by the firm’s primary regulator and information that is publicly available.<sup>26</sup> Evaluation of this information will vary from company to company and from industry to industry, but it will use six basic characteristics as a guide: “(i) size, (ii) interconnectedness; (iii) substitutability, (iv) leverage, (v) liquidity risk and maturity mismatch, and (vi) existing regulatory scrutiny.”<sup>27</sup> Size, interconnectedness, and substitutability are used to assess the firm’s potential “distress to the broader economy.”<sup>28</sup> Leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny are used to assess to how likely it is a firm will experience financial distress.<sup>29</sup>

After stage two, if FSOC believes it may be necessary to designate a nonbank entity as a SIFI, then the nonbank entity moves to

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<sup>22</sup> *Id.* at 21641–42 (explaining that the purpose of stage-one is to “narrow the universe” of possible designees by applying “uniform quantitative thresholds”).

<sup>23</sup> *Id.* at 21642 (stating that if an entity exceeds the requisite thresholds in stage-one then they will move on to consideration under stage-two); *Financial Stability Oversight Council: Nonbank Designations—FAQs*, U.S. DEP’T TREASURY, <https://www.treasury.gov/initiatives/fsoc/designations/Pages/nonbank-faq.aspx> [<https://perma.cc/4HNA-NKP7>] (last visited May 30, 2019).

<sup>24</sup> 77 Fed. Reg. at 21,643 (identifying the other five thresholds as (i) \$30 billion in gross notional credit default swaps outstanding; (ii) \$3.5 billion of derivative liabilities; (iii) \$20 billion in total debt outstanding; (iv) fifteen-to-one leverage ratio of total consolidated assets to total equity; and (v) ten percent short-term debt ratio of total debt outstanding with a maturity of less than twelve months to total consolidated assets).

<sup>25</sup> *Id.* at 21645.

<sup>26</sup> *Id.* (describing the information that is used to conduct the review process in stage two).

<sup>27</sup> *Id.* at 21641, 21645.

<sup>28</sup> *Id.* at 21641.

<sup>29</sup> *Id.*

the third stage, and FSOC notifies the entity of its decision.<sup>30</sup> In stage three, FSOC will assess the potential harm the firm can pose to U.S. financial stability through information directly obtained from the firm, as well as the information previously gathered.<sup>31</sup> FSOC will look at factors such as the firm's "resolvability, the opacity of its operations, its complexity, and the extent and nature of its existing regulatory scrutiny."<sup>32</sup> FSOC declined to give more specifics on its assessment because of the diverse types of firms that will be evaluated and the "unique threats" each of these firms may pose to the U.S. financial system.<sup>33</sup> However, FSOC will disclose the basis of any proposed or final determination once a firm has entered evaluation under stage three, even if FSOC declines to designate the firm as a SIFI.<sup>34</sup>

#### D. The Initial Designations

Using the process described above, FSOC designated four nonbank financial companies as SIFIs.<sup>35</sup> Those companies were Prudential, AIG, GE Capital, and MetLife.<sup>36</sup> FSOC determined that financial distress at each of these companies "could threaten U.S. financial stability."<sup>37</sup>

In AIG's case, FSOC determined that AIG was substantially interconnected with the broader economy and held liabilities that could present risk to the financial system in light of its interconnectedness.<sup>38</sup>

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<sup>30</sup> *Id.* at 21646 ("[T]he Council expects to notify a nonbank financial company that has been evaluated in Stage 3.").

<sup>31</sup> *Id.* at 21642.

<sup>32</sup> *Id.* at 21646.

<sup>33</sup> *Id.* ("This approach will enable the Council to engage in a flexible, company-specific analysis that will reflect the unique risks posed by each nonbank financial company.").

<sup>34</sup> *Id.* ("[T]he Council expects to notify a nonbank financial company that has been evaluated in Stage 3 if the company, either before or after a proposed determination, ceases to be considered for determination.").

<sup>35</sup> See Kress, *supra* note 1, at 173.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 172.

<sup>38</sup> FIN. STABILITY OVERSIGHT COUNCIL, BASIS OF THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S FINAL DETERMINATION REGARDING AMERICAN INTERNATIONAL GROUP, INC. 2 (2013) ("Because of AIG's size and interconnectedness, certain characteristics of its liabilities and products, the potential effects of a rapid liquidation of its assets, potential challenges with resolvability, as well as other factors described herein, material financial

As the third largest insurer in the U.S., FSOC believed that a large number of corporate and financial entities would suffer if AIG experienced material financial distress.<sup>39</sup> For example, FSOC believed that even though AIG's life insurance and annuity product reserves for claim and benefit payments were considered long-term liabilities, a large percentage of these liabilities were available for immediate withdrawal by policy holders with little to no penalty.<sup>40</sup> Withdrawals of this nature could accelerate if AIG began to experience financial distress and require AIG to sell assets to meet its future obligations.<sup>41</sup> This liquidation could create negative effects in the market and deteriorate the value of assets held by third-parties in AIG, such as pension funds that held insurance contracts with AIG.<sup>42</sup>

FSOC designated GE Capital as a SIFI because it was a significant source of credit to the U.S. economy, was interconnected with large financial intermediaries, and had exposure to risky financial instruments.<sup>43</sup> As of December 2012, GE Capital provided financing to over 243,000 commercial customers, 201,000 small business, and 57 million individual customers in the United States.<sup>44</sup> Other large financial intermediaries were highly interconnected with GE Capital

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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.”).

<sup>39</sup> *Id.* at 2–6.

<sup>40</sup> *Id.* at 7 (“Although AIG’s life insurance and annuity product reserves for claim and benefit payments are generally considered to be long-term liabilities, a substantial portion of these liabilities are available for discretionary withdrawal with little or no penalty.”).

<sup>41</sup> *Id.* (“A large number of withdrawals and surrenders within a short period of time could strain AIG’s liquidity resources and compel the company to sell assets in order to meet its obligations to policyholders.”)

<sup>42</sup> *Id.* at 6–7 (“If AIG were to experience material financial distress, the pension plan parties to these wrap contracts could be forced to write down their assets from book to market value, resulting in costs for the pension plan sponsors.”).

<sup>43</sup> See generally FIN. STABILITY OVERSIGHT COUNCIL, BASIS OF THE FINANCIAL STABILITY OVERSIGHT COUNCIL’S FINAL DETERMINATION REGARDING GENERAL ELECTRIC CAPITAL CORPORATION, INC. (2013); *Financial Regulation—Dodd-Frank Act—FSOC Determines General Electric Subsidiary No Longer a Systemically Important Financial Institution—Financial Stability Oversight Council, Basis for the Financial Stability Oversight Council’s Rescission of Its Determination Regarding GE Capital Global Holdings, LLC*, 130 HARV. L. REV. 1289, 1290–93 (2017)

<sup>44</sup> FIN. STABILITY OVERSIGHT COUNCIL, *supra* note 42, at 2.

because of its dependence on wholesale short-term funding and its use of long-term and securitization debt.<sup>45</sup> GE Capital was further exposed to other large financial intermediaries through risky activities such as derivatives, maintenance of credit lines, and its role as the reference entity for \$77 billion in gross national credit default swaps.<sup>46</sup> Through these channels, GE Capital could transmit financial distress to other large financial intermediaries, thereby causing simultaneous losses in those institutions which would significantly harm the broader economy.<sup>47</sup>

FSOC's designation of MetLife was similar to FSOC's designation of AIG and GE Capital. Like AIG, FSOC was worried about potential liquidity strains that counterparties could force upon MetLife.<sup>48</sup> FSOC was concerned about this because of MetLife's capital-markets products that counterparties could terminate early, and because of MetLife's long-term insurance liabilities that policyholders could exchange for cash at their discretion.<sup>49</sup> FSOC also found that other large financial intermediaries were significantly interconnected to MetLife.<sup>50</sup> If MetLife were required to sell off assets in the event of a liquidity strain, it could expose these financial intermediaries, as well as its approximately 100 million policy holders worldwide to financial risk.<sup>51</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 6 (“[GE Capital] also has off-balance-sheet exposures to other large financial institutions through its derivatives activities and maintenance of credit lines with other large financial institutions. In addition, there is approximately \$77 billion in gross national credit default swaps outstanding for which [GE Capital] is the reference entity.”).

<sup>47</sup> *Id.* (“[These activities] could serve as a mechanism by which material financial distress at [GE Capital] could be transmitted to those firms and to financial markets more broadly.”)

<sup>48</sup> See generally FIN. STABILITY OVERSIGHT COUNCIL, BASIS OF THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S FINAL DETERMINATION REGARDING METLIFE, INC. (2013).

<sup>49</sup> *Id.* at 16 (“A potential liquidity strain could arise from MetLife's institutional and capital markets products that are subject to early termination or non-renewal at the option of counterparties, or from the substantial portion of the company's insurance liabilities that policyholders can surrender in exchange for cash value.”).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

Prudential, another large insurance company, was designated a SIFI for similar reasons.<sup>52</sup> Among them, FSOC was concerned that the nature of the products offered by Prudential could result in liquidity strains in the same way as AIG and MetLife.<sup>53</sup> These liquidity strains could expose other large financial intermediaries, as well as Prudential's policy holders to financial risk.<sup>54</sup> FSOC believed this threat was aggravated due to Prudential's mix of derivatives contracts and short-term funding arrangements.<sup>55</sup> If the counterparties to these contracts believe there is a risk of asset liquidation then they may require Prudential to post more collateral.<sup>56</sup> Prudential would need even more liquidity to satisfy these collateral demands, increasing the risk of an asset fire sale.<sup>57</sup> An asset fire sale would put the corporations, banks, and pension plans with exposure to Prudential at risk and in the aggregate possibly harm the broader economy.<sup>58</sup>

#### E. The Initial De-designations

The firms "unsurprisingly" resisted the SIFI designation, as they did not want to incur the increased regulatory burden.<sup>59</sup> Prudential claimed that it would incur added expenses of up to \$135 million.<sup>60</sup> In a losing effort, Prudential and MetLife both appealed their designations.<sup>61</sup> MetLife even went on to challenge the designation in federal court.<sup>62</sup> However, AIG, GE Capital, and even MetLife began to

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<sup>52</sup> See generally FIN. STABILITY OVERSIGHT COUNCIL, BASIS OF THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S FINAL DETERMINATION REGARDING PRUDENTIAL FINANCIAL, INC. (2013) (discussing the reasons for Prudential's SIFI designation).

<sup>53</sup> *Id.* at 8 ("[A] substantial portion of [Prudential's] liabilities in the U.S. general account are available for discretionary withdrawal with little or no penalty and therefore could, in practice, have characteristics of short-term liabilities.").

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 3.

<sup>56</sup> *Id.*

<sup>57</sup> See *id.*

<sup>58</sup> *Id.*

<sup>59</sup> Kress, *supra* note 1, at 173.

<sup>60</sup> *Id.* (stating that Prudential claimed its SIFI designation would increase its regulatory burden by \$135 million).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

make changes to their business structures in an effort to remove the SIFI designation.<sup>63</sup>

In response to the structural changes made by GE Capital and AIG, FSOC ultimately de-designated both institutions, thus removing their SIFI labels.<sup>64</sup> In 2016, three years after GE Capital's initial designation, FSOC de-designated it as a SIFI after finding that GE Capital had "fundamentally changed its business."<sup>65</sup> In the time since its designation, GE Capital had decreased its assets by fifty percent, eliminated its reliance on short term funding, divested \$272 billion of assets in other financial intermediaries, and stopped providing credit to small businesses and consumers in the U.S.<sup>66</sup> These changes led to FSOC concluding that financial distress at GE Capital no longer posed a threat to the financial stability of the U.S.<sup>67</sup>

AIG also took steps to reduce the risk it posed to the broader economy.<sup>68</sup> AIG "reduced the amounts of its total debt outstanding, short-term debt, derivatives, securities lending, repurchase agreements, and total assets."<sup>69</sup> AIG also altered the incentives for policy holders to trade in their agreements for cash, which reduced the likelihood AIG would need to resort to an asset fire sale.<sup>70</sup> As a result of these changes, FSOC decided that AIG, like GE, no longer posed a great enough threat to the health of the U.S. financial system to justify its SIFI designation.<sup>71</sup>

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<sup>63</sup> *Id.* at 174 ("One by one, as the designated companies came to grips with their new found SIFI status, the firms began to sell off parts and shift to less risky activities in an effort to escape the SIFI label.").

<sup>64</sup> *Id.* (discussing FSOC's de-designation of AIG and GE Capital due to their "reduced systemic footprints").

<sup>65</sup> *See generally* FIN. STABILITY OVERSIGHT COUNCIL, BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING GE CAPITAL GLOBAL HOLDINGS, LLC 2 (2016).

<sup>66</sup> *Id.* at 2–6 (discussing specific changes GE Capital made in order to effectuate its de-designation).

<sup>67</sup> *Id.* at 2.

<sup>68</sup> *See generally* FIN. STABILITY OVERSIGHT COUNCIL, BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S RESCISSION OF ITS DETERMINATION REGARDING AMERICAN INTERNATIONAL GROUP, INC. (2016).

<sup>69</sup> *Id.* at 5.

<sup>70</sup> *See id.* (stating that AIG structured the agreements with policyholders in a way that reduced the likelihood that policyholders would quickly convert a large portion of AIG's long-term liabilities into short-term debt).

<sup>71</sup> *Id.* at 65 ("Based on the Council's analysis of AIG and changes since July 2013 that could be material to the Council's conclusions, and in light of the

## F. A Change in Approach

In November 2017, the Treasury Department issued a report (Treasury Report) with recommendations for reforming FSOC's SIFI designation process.<sup>72</sup> The Treasury Report outlined five goals that the SIFI designation process should be centered around: "leverage the expertise of primary financial regulatory agencies; promote market discipline; maintain a level playing field among firms; appropriately tailor regulations to minimize burdens; ensure the Council's designation analyses are rigorous, clear, and transparent."<sup>73</sup> These goals are consistent with FSOC's mission of identifying risks in the financial system and acting as an information sharing entity for the various U.S. regulators.<sup>74</sup> However, the Treasury Report argued that FSOC should change its SIFI designation approach from identifying individual entities that pose risk to an activities-based approach.<sup>75</sup> Instead of focusing on designating single entities as SIFIs, the Treasury Report said that the focus would be on industry-wide or product-based risk.<sup>76</sup> Proponents argue that SIFI designations do not prevent risky activities; rather, they only transfer the risky activities from large institutions to another part of the financial system.<sup>77</sup> However, detractors argue that this sets too high a threshold for using FSOC's SIFI designation power and will limit its ability to "effectively combat financial risk."<sup>78</sup> The SIFI designation process under FSOC's prior methods took approximately two years, and if FSOC were to

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statutory considerations, the Council has rescinded its final determination that material financial distress at AIG could pose a threat to U.S. financial stability.").

<sup>72</sup> Madison et al., *supra* note 2 (citing U.S. DEP'T OF THE TREASURY, A FINANCIAL SYSTEM THAT CREATES ECONOMIC OPPORTUNITIES: BANKS AND CREDIT UNIONS (2017)).

<sup>73</sup> *Id.*

<sup>74</sup> *See id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* ("[B]ecause systemic risk does not in fact depend on where risky activities and products are concentrated, relying on blunt instruments such as a firm's size or legal form may merely move the risk throughout the financial system rather than alleviate it.")

<sup>78</sup> *Id.*

attempt activity-based regulations prior to resorting to a SIFI designation, the process could take significantly longer.<sup>79</sup>

### G. Changes in Practice

The Treasury Report labeled SIFI designations as a blunt instrument for regulating systemic risk.<sup>80</sup> This disapproving label signaled FSOC's actions regarding the only two SIFI designations remaining, MetLife and Prudential.<sup>81</sup> FSOC stopped fighting the ongoing litigation regarding the MetLife designation, which effectively removed MetLife's SIFI designation.<sup>82</sup> FSOC also decided to de-designate Prudential as a SIFI, removing the last remaining SIFI label.<sup>83</sup>

The Prudential de-designation effectively signaled the change in FSOC's approach.<sup>84</sup> By the time MetLife lost its SIFI designation it had removed its retail insurance business and shrunk by twenty percent.<sup>85</sup> Unlike the other three entities designated as SIFIs, which had all reduced in size and complexity, Prudential had grown in both.<sup>86</sup> Since the time of its designation, Prudential had increased its assets and holdings in derivatives, repurchase agreements, and securities lending.<sup>87</sup> Thus, the reason FSOC gave for its de-designation was not that Prudential had changed, but that FSOC erred in its original designation.<sup>88</sup> FSOC stated that the original concerns of financial distress at Prudential spreading to other areas of the economy were overestimated.<sup>89</sup> FSOC's recent de-designation of Prudential following

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<sup>79</sup> *Id.* (“[T]he Treasury proposal would make this significantly more cumbersome by requiring attempted activities-based regulatory maneuvers to run their course before assessing individual entities for designation.”)

<sup>80</sup> *See* Kress, *supra* note 1, at 174.

<sup>81</sup> *See id.* (discussing the change in FSOC policy after the Trump Administration took control).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (“Even MetLife, which eventually prevailed in its district court battle with FSOC, spun off its retail insurance segment, shrinking by nearly 20 percent in the process.”)

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 175.

<sup>89</sup> *Id.* (“[T]he Trump Administration FSOC disagrees with the Obama Administration's assessment of the extent to which a forced asset liquidation

its proposed changes has left many wondering if FSOC under the Trump administration has effectively abandoned its SIFI designation power altogether.<sup>90</sup>

## H. Conclusion

FSOC's ability to designate nonbank entities as SIFIs and subject them to greater regulatory burdens has been controversial since its inception.<sup>91</sup> However, following Dodd-Frank, FSOC set out to create a process for identifying nonbank entities that should be held to stricter prudential standards.<sup>92</sup> While FSOC went out designating a number of nonbank entities as SIFIs, FSOC's recent change of heart has left observers questioning the future of FSOC's SIFI designation authority and whether the Trump Administration has decided to dispose of the tool altogether.

Max Braun<sup>93</sup>

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by Prudential would disrupt markets or cause losses to other firms with similar holdings.”)

<sup>90</sup> *Id.*

<sup>91</sup> Madison et al., *supra* note 2.

<sup>92</sup> *See generally* Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21,637 (Apr. 11, 2012) (to be codified at 12 C.F.R. pt. 1320) (describing the initial designation process).

<sup>93</sup> Student, Boston University School of Law (J.D. 2020).