STATEMENT OF EUGENE SCALIA[*]
GIBSON, DUNN & CRUTCHER LLP
BEFORE THE
SENATE COMMITTEE ON BANKING, HOUSING, & URBAN AFFAIRS
REGARDING THE ROLE OF THE FINANCIAL STABILITY BOARD
IN THE U.S. REGULATORY FRAMEWORK

July 8, 2015

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to testify today on the role of the Financial Stability Board ("FSB") in the financial regulatory framework of the United States. I speak to you today not as a policy expert on financial institutions or the banking system, but as a lawyer who practices administrative law and has represented clients in connection with activities of the FSB and designation as a systemically important financial institution ("SIFI") by the Financial Stability Oversight Council, or "FSOC." I testify in my individual capacity, and not on behalf of any clients. The views I express are my own.

The FSB was established by the G-20 nations in April 2009 to help rehabilitate and fortify the global financial system in the wake of the 2008 financial crisis.[1] Its membership comprises the financial regulatory agencies of the G-20 nations, including—from the United States—the Department of Treasury, the Federal Reserve Board, and the Securities and Exchange Commission ("SEC").[2] Its functions include coordinating with financial authorities of

---

[*] Eugene Scalia is a partner in the Washington, D.C. office of Gibson Dunn & Crutcher LLP, where he co-chairs the firm's Administrative Law and Regulatory Practice Group. He frequently represents clients in proceedings before administrative agencies, and in litigation concerning agency actions. He previously served as U.S. Solicitor of Labor—the principal legal officer of the U.S. Department of Labor—and as Special Assistant to the Attorney General of the United States. He is a graduate of the University of Virginia and the University of Chicago Law School, where he was editor-in-chief of the *Law Review*. He is a public member of the Administrative Conference of the United States.

[1] *About the FSB*, Financial Stability Board, http://www.financialstabilityboard.org/about/ (last visited June 29, 2015).

[2] *Members of the FSB*, Financial Stability Board, http://www.financialstabilityboard.org/about/organisation-and-governance/members-of-the-financial-stability-board/ (last visited July 4, 2015); *see also Members of the*

(Cont'd on next page)

member nations and other international bodies to develop regulatory policies, assessing potential vulnerabilities within the global financial system, and recommending measures to protect and strengthen the financial system.[3]

These are important functions, and there is a valuable role to be played by an organization such as the FSB. As a nation we participate in a global financial system in which events abroad can substantially affect what happens here—we have an interest in the soundness and integrity of our trading partners' financial systems, just as they do in ours. We also have an interest in the regulatory requirements of different jurisdictions being harmonized on the basis of a reasonable set of principles and prescriptions.

But of course the FSB has limitations. The nations represented on the FSB—and financial institutions within those nations—have interests that may diverge from the interests of the United States and U.S.-based financial institutions. The FSB is not governed by U.S. law or legal processes. The policy prescriptions preferred by some, or even a majority of, FSB members may not necessarily comport with U.S. law or policy. And of course, U.S. officials participating in the FSB cannot commit to actions that depart from requirements of U.S. law, or that are not currently authorized by U.S. law.

In short, it is essential for nations' financial leaders to share information and to seek consensus on matters that require international coordination. But concerns arise if U.S. legal

---

(Cont'd from previous page)

Financial Stability Board, http://www.financialstabilityboard.org/wp-content/uploads/plenary1.pdf (last visited July 4, 2015). Currently, Nathan Sheets, Undersecretary for International Affairs, represents the Treasury Department, Daniel K. Tarullo, Governor, represents the Federal Reserve, and Mary Jo White, Chair, represents the SEC. *Id.*

[3] *Id.*

rights and processes take a back seat to decisions that were forged in private meetings with regulators overseas.

That concern has been raised in connection with the designation of systemically important financially institutions, particularly insurance companies. In July 2013, FSB designated nine companies as "global systemically important insurers," or "G-SIIs."[4] The FSB simultaneously identified certain "policy measures" that it said "will apply to G-SIIs," as well as "timelines" "for the further development and application of the policy measures."[5] Among these measures were "enhanced group-wide supervision," through which a "group-wide supervisor" would "have direct powers over holding companies" of the designated insurers, as well as the imposition of "higher loss absorbency requirements," including requirements that the firms hold increased capital.[6]

FSB's process for designating the nine insurers was opaque. The FSB said that it used the assessment methodology developed by the International Association of Insurance Supervisors ("IAIS"),[7] which purports to discern insurers "whose distress or disorderly failure, because of their size, complexity, and interconnectedness, would cause significant disruption to the global financial system and economic activity."[8] The IAIS methodology focuses on five characteristics of firms (including a firm's "size," "interconnectedness," and "non-insurance activities," for instance) and assigns a weight to each characteristic in making the assessment of

---

[4] FSB, "Global Systemically Important Insurers (G-SIIs) and the Policy Measures that Will Apply to Them" ("FSB's 2013 G-SIIs"), at 1 (July 18, 2013), *available at* http://www.financialstabilityboard.org/wp-content/uploads/r_130718.pdf?page_moved=1.

[5] *Id.* at 2.

[6] *Id.*

[7] *Id*. at 1.

[8] IAIS, "Global Systemically Important Insurers: Initial Assessment Methodology," at 3 (July 18, 2013), *available at* https://www.lloyds.com/~/media/files/the%20market/operating%20at%20lloyds/regulation/gpa/final_initial_assessment_methodology_18_july_2013.pdf.

systemic importance—size is five percent of the calculus, for instance, while non-insurance activities are forty-five percent.[9] The IAIS published this assessment methodology the same day that the FSB announced the nine designations that it said resulted from application of the methodology.

In designating these nine G-SII's in 2013—which it subsequently re-designated in November 2014[10]—FSB did not explain how the firms had performed under this assessment methodology, nor how specific activities of each firm were assessed when judging its "non-insurance activities," for example, or how "interconnected" it is. The designated firms were not notified in advance how they had performed on these matrices, they therefore had no opportunity to respond or correct errors, and FSB's G-SII designation was final—there is no court to contest the designation, or law to reverse it. And yet, as noted, in designating the companies the FSB also identified a list of policy measures, and a timetable, that it said "will apply" to the companies. FSB's reference to a "group-wide supervisor" exercising "direct power[ ]" over a G-SII's holding company presumably is a role that could be filled only by a regulator in the company's home country.

Three U.S. companies were among the nine G-SII's identified by the FSB in July 2013: American International Group, Inc. ("AIG"), Prudential Financial, Inc., and MetLife, Inc.[11]

---

[9] *Id.* at 12-18.

[10] FSB, "2014 Update of List of Global Systemically Important Insurers (G-SIIs)," at 1 (November 6, 2014), *available at* http://www.financialstabilityboard.org/2014/11/fsb-announces-update-of-list-of-global-systemically-important-insurers-g-siis/.

[11] FSB's 2013 G-SIIs at 2. The list of nine G-SIIs also includes five European insurers and one Chinese company. *See* G-20 Financial Stability Board Names Nine Insurers Systemically Important, The Wall Street Journal (July 18, 2013), *available at* http://www.wsj.com/articles/SB10001424127887323993804578614244083814244 (last visited July 4, 2015).

Those same three companies have now all been designated as systemically important nonbank companies by the Financial Stability Oversight Council in the U.S.[12]

As the Committee is aware, the Dodd-Frank Act sets forth specific criteria for FSOC to consider in determining whether a company is systemically important to U.S. financial stability. There is overlap, but those criteria are not the same as the assessment methodology used by FSB. The Dodd-Frank Act also sets forth specific *processes* to be followed by FSOC in making its SIFI determinations. Under principles of U.S. constitutional law, those processes must apprise the companies under consideration of the legal standard being applied to them, and must give the companies a full and fair opportunity to present their case before decisionmakers who approach the matter without prejudgment and with an open mind.

Leaders of the Department of the Treasury, the Federal Reserve Board, and the Securities and Exchange Commission are members of the FSB Plenary—the decision-making body of the FSB,[13] which designated the three U.S. companies as globally-significant insurers—and of FSOC, which subsequently identified the same companies as systemically important to the U.S.

We have no record of the role that the U.S. FSB members played in the G-SII designation process. However, this dual participation—and the relationship between the FSB and FSOC—presents the potential for two concerns.

First, there is the risk that members participating in the FSB may prejudge questions that will come before them as members of FSOC—and will do so without the affected U.S. companies enjoying the procedural protections afforded by U.S. law. In designating the

[12] *See* FSOC, Basis for the Financial Stability Oversight Council's Final Determination Regarding MetLife, Inc. ("MetLife Designation") (Dec. 18, 2014); FSOC, Basis for the Financial Stability Oversight Council's Final Determination Regarding Prudential Financial, Inc. ("Prudential Designation") (Sept. 19, 2013); FSOC, Basis for the Financial Stability Oversight Council's Final Determination Regarding American International Group, Inc. ("AIG Designation") (July 8, 2013).

[13] *Supra* n.2.

companies it did, the FSB evidently concluded that the companies' financial distress "would cause significant disruption to the global financial system and economic activity," which is the benchmark under the IAIS methodology that the FSB said it applied.[14] The FSOC designations conducted to date have been based on the conclusion that material financial distress at the subject company "could pose a threat to the financial stability of the United States."[15] The first of these assessments—risk to the global economy—would seem as a matter of logic to encompass the second: threat to the company's home economy. Accordingly, if a decisionmaker has concluded that a U.S. company's distress would be a threat to the global financial system, it is not clear how that decisionmaker would not see the company's distress as a threat to the financial system of the country where it has the majority of its operations.

Under principles of U.S. administrative law, it is essential that members of an agency not "adjudg[e] the facts . . . [or] law of a particular case in advance of hearing it,"[16] and that agencies maintain "a flexible and open-minded attitude" in administrative proceedings.[17] Accordingly, in one court case, an absence of due process was found where an agency decisionmaker had made a speech that indicated he already had reached a decision on a case that was pending before him.[18] Although the person who gave the speech was not the only agency decisionmaker involved in the proceedings, the court sent the case back to the agency because, it said, "Litigants are entitled to

---

[14] *Supra* n.8 at 3.

[15] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5323(a)(1).

[16] *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 591-92 (D.C. Cir. 1970).

[17] *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004); *see also Castaneda-Castillo v. Gonzales*, 488 F.3d 17, 25 (1st Cir. 2007) (emphasizing importance of an agency's "open mind" and a "fresh look, unclouded by any prior judgment"); *Advocates for Highway and Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1293 (D.C. Cir. 1994) (discussing need for agency to maintain an open mind in review of comments during rulemaking and holding that "[a] review of the comments submitted and the responses made persuades us that the agency approached the post-promulgation comments with the requisite open mind").

[18] *Cinderella Career*, 425 F.2d at 591-92.

an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."[19] That ruling is consistent with what the Supreme Court has described as a U.S. legal system that "has always endeavored to prevent even the probability of unfairness."[20]

Regulators will naturally bring to their jobs certain preconceptions on matters of policy. But concerns arise when, for example, there has been a prejudgment on a factual matter that will come before an official in his or her adjudicative capacity.

As I have noted, there is no record of the role that the Treasury Department, Federal Reserve, and Chair of the SEC played in the initial designation and subsequent redesignation of the G-SIIs by the FSB. And it is not my suggestion that they brought any bias or prejudgment to those proceedings. But to the extent that one or all joined in the FSB's designation of U.S. companies as G-SIIs, it becomes a legitimate subject of inquiry what effect, if any, that prior participation had in the FSOC proceedings.

Second, and regardless of the role any FSOC member plays in the FSB, there would be cause for concern if the designations by the FSB influenced the decisions of FSOC.

FSOC is governed by U.S. law. The FSB is not. As noted, the Dodd-Frank Act sets forth specific criteria for FSOC to apply. The FSB criteria, to the extent they can be discerned, are different. Perhaps most important, Dodd-Frank establishes *procedures* for FSOC to reach its decisions. Under our Constitution, an essential element of due process is that an affected person (or company) have an opportunity to be heard and make its case at an appropriate time before a

---

[19] *Id.* at 592; *see also Amos Treat & Co. v. SEC*, 306 F.2d 260, 264 (D.C. Cir. 1962) (observing that "with respect to agency adjudicatory proceedings, due process might be said to mean at least 'fair play'" and "it goes beyond that which is permissible from the standpoint of either litigants or the public" where "one member of the body which made exceedingly important findings of fact had already thrown his weight on the other side").

[20] *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

decisionmaker who approaches the matter with an open mind. It would be of serious concern if the FSOC process were not, in fact, the proceeding in which designation decisions were genuinely being made, but instead were functioning as a means by which FSB decisions are implemented by U.S. regulators.

There has been a suggestion that is the case by one of the members of FSOC. Roy S. Woodall, Jr., who holds the seat on the FSOC reserved by statute for "an independent member . . . having insurance expertise,"[21] said in his dissent from FSOC's designation of Prudential that "the international and domestic processes" for SIFI designation "may not be entirely separate and distinct," and that "the declaration of Prudential as a G-SII by the FSB based on the assessment by the U.S. and global insurance regulators, supervisors, and others who are members of the IAIS, has overtaken the Council's own determination process."[22] Mr. Woodall also suggested that FSOC's replication of FSB's designations appeared to be something the FSB expected and needed to occur, since "the FSB pronouncements . . . [could] only be achieved in the U.S. through a subsequent Council designation."[23]

Mr. Woodall expressed similar concerns in dissenting from the MetLife designation late last year. That designation "should come as no surprise to anyone," he wrote, in light of "the chronology of certain circumstances that led to MetLife's designation," including the FSB's earlier identification of MetLife as a G-SII.[24] The only means by which FSB designations can be given force, Mr. Woodall explained, is by home country regulators such as FSOC adopting the

---

[21] 12 U.S.C. § 5321(b)(1)(J).

[22] Dissent of Roy S. Woodall, Jr., Independent Member with Insurance Expertise, to Prudential Designation ("Woodall Prudential Dissent"), at 9 (Sept. 18, 2013).

[23] *Id.*

[24] MetLife Designation at 301 (Dissent of Roy S. Woodall, Jr., Independent Member Having Insurance Expertise).

designations and "policy measures" adopted by FSB.[25] A "failure of the Council to designate MetLife," he wrote, "would thus appear to amount to a failure of the U.S. to meet international commitments already made within the G-20."[26]

These are serious concerns by someone who personally participated in FSOC's deliberations. We cannot know all that underlies Mr. Woodall's statements, but they are worth further exploration, such as it appears the Committee is undertaking. By way of analogy, if a judge who sat on a three-judge panel of a court of appeals wrote in dissent not merely that her colleagues were wrong, but that some of them had based their decision on considerations other than the applicable law, the facts in the record, and the explanation they gave in their majority opinion, we would regard that as a serious issue. As a technical legal matter, incidentally, an FSOC designation is an "adjudication" under U.S. administrative law because it is a judgment about a single, specific entity—and a judgment of potentially enormous consequence. Principles of judicial decisionmaking are therefore an appropriate point of reference.

Mr. Woodall's description of the relationship between FSB and FSOC finds some support in statements by the FSB itself. Earlier this year, FSB Chairman Mark Carney issued a memorandum to the G-20 regarding member nations' implementation of FSB policies.[27] He stated:

> Full, consistent and prompt implementation is essential to maintaining an open and resilient global financial system. The FSB will support the determined efforts of its members through enhanced monitoring of implementation and its effects across all jurisdictions. We will regularly report our key findings to the G20.[28]

---

25 *Id.* at 302.

26 *Id.*

27 Memorandum from Mark Carney to G20 Finance Ministers and Central Bank Governors, at 1 (Feb. 4, 2015), *available at* https://g20.org/wp-content/uploads/2015/04/Financial-Reforms-Finishing-the-Post-Crisis-Agenda-and-Moving-Forward-FSB-Chair-letter-to-G20-February-20151.pdf.

28 *Id.*

In short, Mr. Carney is saying, FSB expects member nations to implement its "policy measures." It will "monitor" their efforts, and report on them to the G-20 principals. As stated on its website, FSB will use "moral suasion and peer pressure" to achieve its policies at the national level of its members.[29] And after all, what expectation does FSB have *other than that* its members will proceed to use the tools available to them to implement the "policy measures" that FSB adopts? Its Charter itself avows that FSB "will . . . promote member jurisdictions' implementation of agreed commitments," and that members' "commitments," in turn, include "implement[ing] international financial standards."[30] A Standing Committee of the FSB exists to "ensure comprehensive and rigorous monitoring" of its members' "agreed G20 and FSB commitments."[31]

There are others better positioned than I to fully explore the influence of the FSB's designations on FSOC's decisions. I do believe, however, that the explanations FSOC has given for its actions in its designation decisions are unpersuasive on their own terms. They reflect significant lapses of logic and evidence, which raise the question whether those explanations are a full account of what drove FSOC's decisions, or whether instead the FSB's earlier designations were a silent force behind FSOC's decisionmaking. I will give two examples.

The first involves FSOC's reliance on company-specific designations to address systemic risk believed to be posed by insurers, but to lean toward a so-called activities-based approach in the case of asset managers. The activities-based approach addresses systemic risk on an activity-

---

[29] *About the FSB*, Financial Stability Board, http://www.financialstabilityboard.org/about/ (last visited July 4, 2015).

[30] Charter of the Financial Stability Board, at 2, 4 (June 2012), *available at* http://www.financialstabilityboard.org/wp-content/uploads/r_090925d.pdf?page_moved=1 (last visited July 6, 2015).

[31] *Id.* at 7.

by-activity, rather than by designating specific companies. FSOC currently is considering such an approach toward the systemic risk that has been said to be posed by mutual funds and other large asset managers.[32]

Insurance companies—including Prudential and MetLife—have asked that FSOC consider an activities-based approach toward the insurance industry also.[33] FSOC has declined to do so. It gave an explanation for this position in its decision designating MetLife that was essentially circular. When making a company-specific designation decision under Dodd-Frank Section 113, FSOC said, it is required "to take into account a specific set of considerations in making a determination" of the company's systemic importance, and "[c]onducting or considering an industry-wide, activities-based analysis is not one of the statutory considerations."[34] It added that "an industry-wide evaluation of activities is not necessary or appropriate in the case of MetLife," because the "company-specific analysis" it had conducted "supports a determination" that MetLife should be designated on a company-specific basis.[35]

In other words, FSOC's rationale was that it would not consider an activities-based approach for MetLife because it had not considered an activities-based approach. That is a

---

[32] Press Release, Department of the Treasury, Financial Stability Oversight Council Meeting July 31, 2014, *available at* http://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/July%2031%202014.pdf (last visited July 4, 2015); *see also* John Heltman, *Fed's Tarullo Favors Activities-Based Regulation for Asset Managers*, Am. Banker (June 5, 2015).

[33] *See* Statement of the American Council of Life Insurers and the American Insurance Association Before the Subcommittee on Securities, Insurance & Investment of the Senate Committee on Banking, Housing & Urban Affairs on Examining Insurance Capital Rules and FSOC Process, Robert M. Falzon, Executive Vice President & Chief Financial Officer of Prudential Financial, at 12-14 (Apr. 30, 2015), *available at* http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=24a507d6-8f78-4072-a8e3-b296c3a03bb6. *And see* Capital Markets Summit, U.S. Chamber of Commerce, Steven A. Kandarian, "Life Insurers as SIFIs: A Case of Mistaken Identity?," at 6-7 (Apr. 10, 2013), *available at* https://www.metlife.com/assets/cao/pr/Capital-Markets-Summit-Remarks-FINAL.pdf.

[34] MetLife Designation at 31.

[35] *Id.*

strange and wholly unpersuasive explanation for a regulatory decision of immense consequence to MetLife and the other insurers that were designated.

A second area where FSOC's designation decisions have fallen short concerns FSOC's decision not to consider companies' vulnerability to material financial distress when making designation decisions. In this instance, there is evidence that FSOC may indeed have been influenced by views of the FSB that have no place under Dodd-Frank.

The Dodd-Frank Act enumerates ten specific statutory factors for FSOC to consider when making designation decisions.[36] Three of these plainly relate to a company's vulnerability to material financial distress: the extent of the company's leverage, the extent to which the company is already regulated, and the amount and types of liabilities of the company.[37] FSOC previously acknowledged the importance of considering a company's vulnerability when making designation decisions under Dodd-Frank. In the Final Rule and Interpretative Guidance it adopted to guide the SIFI designation process, it stated that fully half of the six "categories" of considerations it identified in the statute concern "the vulnerability of a nonbank financial company to financial distress."[38] It said it would make this part of its analysis when making designation decisions.[39]

Yet it has not done so. In none of the four decisions designating "non-bank SIFIs" to date has FSOC addressed the company's vulnerability to the conditions of material financial distress that animated its designation. And in the MetLife designation decision—which is the

---

[36] 12 U.S.C. § 5323(a)(2).

[37] *Id.* § 5323(a)(2)(A), (a)(2)(H)–(J).

[38] Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 Fed. Reg. 21, 637, 21,641 (Apr. 11, 2012).

[39] *Id.* at 21,641, 21,657-58.

only complete decision that is publicly available[40]—FSOC contended that considering a company's vulnerability would set an "unduly high and falsely precise threshold" for making designation decisions.[41] FSOC has therefore based its designation decisions on assumptions of entirely imaginary and exceptionally severe financial distress at the company in issue.

As noted, this approach conflicts with Dodd-Frank and FSOC's own 2011 Final Rule and Interpretative Guidance. But it does appear to reflect the FSB's view. In setting forth its methodology for identifying global SIFIs, FSB has proposed to "measure the impact that a[non-bank, non-insurance] financial entity's failure can have on the global financial system and wider economy, *rather than the probability that a failure could occur*."[42] This is poor regulatory policy and conflicts with the Dodd-Frank Act, but it has been FSOC's approach also.

I would like to conclude with two observations.

First, the Financial Regulatory Improvement Act of 2015 that has been introduced by the Chairman would make valuable improvements with regard to the FSOC and international bodies such as FSB.[43] Section 403 of the Act—titled "International Insurance Capital Standards Accountability"—would, as its title suggests, give some of the visibility into FSB-type processes that has been lacking, including information on the positions taken by U.S. regulators on policies they may be called upon to address at home. In addition, by requiring consultation with U.S.

---

[40] For each designation, FSOC has released a "public" summary, in addition to the lengthier decisional document provided to the company under consideration. The MetLife Designation was disclosed in the pending litigation.

[41] MetLife Designation at 27-28.

[42] Financial Stability Board, "Consultative Document (2nd) Assessment Methodologies for Identifying Non-Bank Non-Insurer Global Systemically Important Financial Institutions," at 10 (Mar. 4, 2015), *available at* http://www.financialstabilityboard.org/wp-content/uploads/2nd-Con-Doc-on-NBNI-G-SIFI-methodologies.pdf (emphasis added).

[43] Financial Regulatory Improvement Act of 2015, S. 1484, 114th Cong. (2015).

insurance regulators, the bill would inform and presumably enhance the contributions that U.S. participants make in forums of that nature.

Section 302 of the Act—regarding the "nonbank determination process"—addresses one of the most vexing aspects of the current FSOC regime: Companies' uncertainty about what they must do to avoid being systemic and subject to supervision by the Federal Reserve Board. A basic element of constitutional due process is that the government provide notice of what the law is, both to constrain its own discretion and power, and to enable members of the public to conduct themselves so as to avoid adverse consequences under the law.[44] Currently in the case of non-bank SIFI designation, though, there is no practical way for a large financial institution to know what it could do to avoid designation or, once designated, how it could shed the SIFI label and the increased regulation and oversight that come with it. The Chairman's bill would make important headway by enabling a company to submit a plan to FSOC with proposed changes to the company's structure and operations, to persuade FSOC that with those changes, the company would not be systemically important. If FSOC found the plan insufficient and believed the company would be systemic even with those changes, it would be required under the bill to explain why and what actions the company *could* take to avoid regulation as a SIFI.[45]

---

[44] *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them," and must give a "person of ordinary intelligence a reasonable opportunity to know" what the law is, so that "he may act accordingly"); *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 994 (D.C. Cir. 1997) (per curiam) ("A standard with which compliance cannot be assessed . . . is no standard at all for purposes of due process."); *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 2-4 (D.C. Cir. 1987) (vacating a decision by the Federal Communications Commission to dismiss as untimely applications to operate radio stations because the agency's rules addressed the filing of applications "in a baffling and inconsistent fashion" and did not provide "adequate notice of the substance of the rule" to the regulated parties).

[45] Financial Regulatory Improvement Act of 2015 § 302(d), (e).

These legislative changes would give more guidance to companies, would shed light on FSOC's reasoning and constrain its actions, and would chart a course for reducing the number of companies that, in FSOC's judgment, threaten U.S. financial stability. All of this is for the good.

Second, and in closing, I have tried to be clear today in acknowledging the important role to be played by an international forum such as FSB. In a global economy, there are clear benefits from regulators sharing information and know-how and coordinating their actions. There are, however, two circumstances I've touched upon today where particular caution is appropriate in such international forums. One is when the rights and obligations of specific, identifiable U.S. companies are at stake. Under our legal system, U.S. companies have a right to notice and an opportunity to be heard before a government official makes a decision specific to the company that could have a significant adverse effect. So, as U.S. officials participate in forums such as the FSB, it is one thing to discuss general principles of regulatory policy, and quite another to frame resolutions naming specific companies as targets for heightened regulation. In the latter circumstance, alarm bells should sound that cause our representatives to take account of U.S. legal and procedural requirements.

U.S. officials participating in a forum such as the FSB must also, of course, be mindful of the letter and intent of U.S. law. Congress and the States make the laws that govern companies within our borders. It follows that when there is a law on the books governing a subject, that should be the basis for our positions in international policy discussions, lest regulators find themselves in the position of retrofitting a commitment made abroad into a U.S. legal framework that calls for something different.[46]

[46] Presumably this is one of the reasons for Section 403 of the Chairman's Financial Regulatory Improvement Act, which requires disclosure and deliberation in the U.S. regarding any proposed international standards about the capital held by insurance companies. *Id.* § 403(c).

* * *

Thank you for the opportunity to testify today. I would be happy to answer any questions of the Members of the Committee.