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Banking and Finance Law Daily Wrap Up, TOP STORY—D.D.C.: MetLife shakes off SIFI designation, (Mar. 30, 2016)

Banking and Finance Law Daily Wrap Up

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By Anne Sherry, J.D.

The D.C. District Court rescinded the Financial Stability Oversight Council's designation of MetLife as a nonbank systemically important financial institution, removing the insurer from the purview of the Federal Reserve Board. The court's opinion is under seal, symbolic of the opacity in the SIFI process that has drawn criticism from lawmakers and industry groups. The ruling nevertheless is a significant setback for the council, as it presumably held that FSOC's determination was arbitrary and capricious (*MetLife, Inc. v. Financial Stability Oversight Council*, March 30, 2016, Collyer, R.).

FSOC's authority to designate nonbank financial companies for supervision by the Federal Reserve Board has proved controversial, and lawmakers, notably House Financial Services Committee Chairman Jeb Hensarling (R-Tex), have slammed the council for a lack of transparency. (The Oversight Subcommittee also held its own hearing on FSOC's handling of MetLife and the SIFI designation process generally.) Hensarling praised today's ruling even while acknowledging that he wasn't privy to the details: "SIFI is Washington's way of officially anointing these companies as too big to fail, despite promises that the Dodd-Frank Act would end too big to fail."

The court's reasoning in overturning the SIFI designation remains locked in a sealed opinion. Under the Dodd-Frank provision that authorized MetLife's lawsuit, however, the court could only review whether FSOC's determination was arbitrary and capricious. The fact that it came to such a conclusion will be seen as a decisive victory for large institutions. FSOC made its determination after a year of deliberations, which included reviewing 21,000 pages of documents and meeting with MetLife representatives on 12 occasions.

The watchdog group Better Markets, which had sought to unseal the *MetLife* proceedings, criticized the decision. CEO Dennis Kelleher cautioned that the decision could establish "two unequal standards" for systemically important entities: regulated banks and unregulated nonbanks. Risks will migrate to nonbank companies, enabling threats to grow "until they explode, threaten the financial system and economy, and require taxpayer bailouts." FSOC was created in response to such a cycle and to prevent its happening again, Kelleher said.

The U.S. Chamber of Commerce, which, like Better Markets, had filed an amicus brief in *MetLife*, supported the opinion on the grounds of FSOC's lack of transparency. CEO David Hirschmann said that the chamber is concerned that FSOC arbitrarily labeled the largest institutions as systemically important without being able to back up that designation. "FSOC needs to be more transparent and clearly define the process so that companies … are able to understand why they received the label, how they can avoid it, or how they will be regulated when designated," he said. The council should also establish a process for companies to de-designate without having to go through the courts.

The case is No. 15-0045.

Attorneys: Amir Cameron Tayrani (Gibson Dunn & Crutcher LLP) for MetLife, Inc. Deepthy Kishore, U.S. Department of Justice, for Financial Stability Oversight Council.

Companies: MetLife, Inc.

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