Banking and Finance Law Daily Wrap Up, TOP STORY—D.C. Cir.: MetLife lists five reasons why SIFI designation was properly rejected, (Aug. 17, 2016)

Banking and Finance Law Daily Wrap Up

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By Richard A. Roth, J.D.

In response to arguments by the Financial Stability Oversight Council, insurance company MetLife, Inc., is telling the U.S. Court of Appeals for the District of Columbia Circuit that its designation as a systemically important financial institution was wrong for five separate reasons. The company's appellate brief generally claims that the FSOC failed to follow its own rules and to consider factors required by the Dodd-Frank Act, and that it violated both separation of powers and due process requirements, when it designated the company as a SIFI to be supervised by the Federal Reserve Board.

The Dodd-Frank Act charges the FSOC with designating for Fed supervision financial institutions that could pose a threat to U.S. financial stability. A company can be designated as a SIFI either because its material financial distress could pose a threat or because "the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities" of the company could pose a threat (12 U.S.C. §5323(a)(1)). The FSOC used that authority to designate MetLife as a SIFI.

Designation rejection. However, a federal district judge overturned the designation. According to the judge, the SIFI designation was arbitrary and capricious, and the FSOC acted contrary to its published guidance without explaining, or even acknowledging, the deviation. She also criticized the FSOC for failing to consider the costs the designation would impose on Metlife (see *Banking and Finance Law Daily,* April 7, 2016).

FSOC appeal. In its brief seeking the reversal of the district court judge's decision, the FSOC has argued that, contrary to what MetLife claims and the judge ruled, the Dodd-Frank Act does not require it to consider whether the company is likely to suffer material financial distress. Neither is it required to identify precisely how that distress could harm the economy in the case of a financial crisis. In the FSOC's view, it only needs to consider whether material financial distress at MetLife could harm financial stability (see *Banking and Finance Law Daily,* June 17, 2016).

The FSOC also claimed that it does not need to consider the costs that would be imposed on MetLife by a designation. The Supreme Court decision requiring the Environmental Protection Agency to consider costs when imposing pollution regulations on power plants is irrelevant to whether costs to a major financial company should be considered when financial stability is to be protected, according to the FSOC.

MetLife reply. According to MetLife, the FSOC disregarded the criteria set by the Dodd-Frank Act, its own regulation, and evidence that MetLife posed no systemic threat when it decided to designate the company as a SIFI. Now the FSOC is ignoring the reasoning behind its designation and raising new arguments to support its decision, the company continues.

MetLife's brief lays out five reasons why the company's SIFI designation should be rejected:

1. By refusing to consider whether MetLife is vulnerable to material financial distress—the criterion relied on for the designation—the FSOC disregarded its own regulation and interpretive guidance. The FSOC was required to assess whether the company was vulnerable to material financial distress, but instead it assumed not only vulnerability but also "extreme degrees of distress."
2. The FSOC did not apply the stated standard for determining whether material financial distress at MetLife actually could destabilize the economy. The FSOC also failed "to specify plausible, objectively

defined scenarios under which to evaluate the risks posed by MetLife," and it assumed that responses by state insurance regulators would aggravate, rather than ameliorate, financial distress.

3. The FSOC did not consider whether the consequences of the designation actually could weaken the company and make it more likely to experience financial distress.
4. Reasonable alternatives recommended by MetLife, such as system-wide regulation of risky activities, were not considered.
5. During the review and decision-making process, the FSOC refused to give MetLife access to the full administrative record or to information on previous SIFI designations of other companies. It also used an "administrative apparatus" under which the same individuals wrote the rules, prepared the case, proposed the SIFI designation, and made the final decision. This denied the company an opportunity to defend itself, which violated the company's due process rights and separation of powers principles.

The case is No. 16-5086.

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Companies: MetLife, Inc.

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