[ORAL ARGUMENT HELD OCTOBER 24, 2016]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

METLIFE, INC., Plaintiff-Appellee, v. FINANCIAL STABILITY OVERSIGHT COUNCIL, Defendant-Appellant.	No. 16-5086

METLIFE, INC.'S MOTION TO HOLD APPEAL IN ABEYANCE PENDING THE SECRETARY OF THE TREASURY'S FORTHCOMING REPORT ON THE FSOC DESIGNATION PROCESS

Appellee MetLife, Inc. hereby moves to hold this appeal in abeyance pending the report that the President of the United States has directed the Secretary of the Treasury to issue regarding the designation process of the Financial Stability Oversight Council ("FSOC"). Holding the appeal in abeyance pending that report—which will examine the very aspects of the designation process challenged by MetLife in this litigation and found to be flawed by the district court—will enable the new Administration to determine whether any of FSOC's positions in this case should be reconsidered and whether it is appropriate for the government to continue pressing this appeal. At a minimum, the findings of the forthcoming report may substantially illuminate this Court's consideration of the issues on appeal.

FACTUAL BACKGROUND

On April 21, 2017, the President of the United States issued a Memorandum for the Secretary of the Treasury. Presidential Memorandum for the Secretary of the Treasury, 2017 WL 1421320 (Apr. 21, 2017) ("Presidential Memorandum") (attached as Exhibit A). In the Memorandum, the President emphasized that FSOC's "determinations and designations have serious implications for affected entities, the industries in which they operate, and the economy at large." *Id.* at *1. It is therefore "important," the President continued, "to ensure that these processes for making determinations and designations promote market discipline and reduce systemic risk" and that "any entity under consideration for a determination or designation decision is afforded due, fair, and appropriately transparent process." *Id.*

Accordingly, the President "direct[ed] the Secretary" to "conduct a thorough review of the FSOC determination and designation processes" and to "provide a written report to the President within 180 days," Presidential Memorandum § 1, 2017 WL 1421320, at *1, which is a deadline of October 18, 2017. In particular, the President ordered the Secretary to examine a number of features of FSOC's designation process at issue in this litigation, directing the Treasury Secretary to "consider" whether FSOC's processes "are sufficiently transparent," *id.* § 1(a), "provide entities with adequate due process," *id.* § 1(b), and "adequately consider the costs" of designation, *id.* at *2, § 1(f); whether FSOC "should assess the

likelihood of" a company's experiencing "material financial distress," *id.* at *1, § 1(d); and whether determinations "should include specific, quantifiable projections of the damage that could be caused to the United States economy, including a specific quantification of [likely] estimated losses," *id.* at *2, § 1(e). The President's Memorandum also states that, "[p]ending the completion of this review," the Treasury Secretary "shall . . . not vote for any non-emergency proposed determinations under 12 CFR 1310.10(b)." *Id.* § 3. Because the Treasury Secretary's vote is necessary for all designations, 12 U.S.C. § 5323(a)(1), this directive precludes FSOC from designating any companies on a non-emergency basis until the Treasury Secretary has completed his review.

DISCUSSION

This Court should hold the appeal in abeyance pending the Treasury Secretary's forthcoming report on FSOC's designation process. The Court possesses the inherent power to hold a pending appeal in abeyance. *See Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (per curiam); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (a court's authority "to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket"). The Court has repeatedly exercised that power by holding cases in abeyance to allow a new presidential administration to review the prior administration's policies and the government's positions in pending litigation. For

example, following the November 2016 election, the Court granted the House of Representatives' motion to hold in abeyance an appeal of a decision enjoining certain aspects of the Affordable Care Act, even though the Secretary of Health and Human Services and the Treasury Secretary—who were the appellants in the case—opposed the motion. *See United States House of Representatives v. Price*, No. 16-5202 (D.C. Cir. Dec. 5, 2016). After the new Administration took office, the parties jointly requested that the Court continue to hold the appeal in abeyance to enable the parties to explore the potential resolution of the case; the Court again granted that request. *See United States House of Representatives v. Price*, No. 16-5202 (D.C. Cir. Mar. 2, 2017).

Similarly, the Court recently granted the EPA's motion to continue oral argument to allow the new Administration to review the Obama Administration's 2015 ozone National Ambient Air Quality Standards. *See Murray Energy Corp. v. EPA*, No. 15-1385 (D.C. Cir. Apr. 11, 2017). And in *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012), the Court ruled that a petition for review challenging an EPA rule should be held in abeyance because the Obama Administration had issued a notice of proposed rulemaking that, if adopted, would substantially revise the Bush Administration rule that was under review in the case. *Id.* at 390. The Court explained that it is appropriate to hold a case in abeyance when the government is considering a "reversal of course . . . that, if adopted, would

necessitate substantively different legal analysis." *Id.* at 388. "It would hardly be sound stewardship of judicial resources to decide [a] case now," the Court reasoned, where abeyance would allow the government to "correct" its "errors, preserve[ ] the integrity of the administrative process, and prevent[ ] piecemeal and unnecessary judicial review." *Id.*; *see also, e.g.*, *Mississippi v. EPA*, 744 F.3d 1334, 1341 (D.C. Cir. 2013) (describing this Court's order granting EPA's motion to hold cases in abeyance after President Obama took office "to allow the agency to review" Bush Administration rules "and determine whether they should be reconsidered"); *California v. EPA*, No. 08-1178 (D.C. Cir. Feb. 25, 2009) (holding appeal in abeyance to allow President Obama to reconsider Bush Administration's EPA policies).

The President's Memorandum to the Secretary of the Treasury presents the possibility of just such a "reversal of course," *API*, 683 F.3d at 388, that warrants holding this appeal in abeyance. The President has directed the Treasury Secretary to consider, among other things, whether FSOC's processes are "transparent," provide "due process," and "adequately consider the costs" of designation, and whether FSOC "should assess the likelihood" of a company's "material financial distress" and "include specific, quantifiable projections of" potential economic "damage" and "losses." Presidential Memorandum § 1, 2017 WL 1421320, at *1-*2. These areas of inquiry overlap with many of the challenges that MetLife raised

to FSOC's designation determination in this litigation and with several of the deficiencies that the district court identified in its decision rescinding FSOC's designation of MetLife. *See, e.g.*, MetLife Br. 24-29 (FSOC's failure to consider likelihood of material financial distress); *id.* at 34-35 (FSOC's failure to estimate counterparties' losses); *id.* at 59-64 (due-process flaws in designation); JA 808 (ruling that FSOC improperly failed to consider the effects of its designation on MetLife). If the Treasury Secretary's inquiry confirms that FSOC followed flawed procedures when designating MetLife, those findings should prompt the government to reconsider its position on one or more issues in this appeal or conclude that it is no longer appropriate to pursue this appeal at all. At a minimum, the report could substantially inform this Court's consideration of the parties' arguments and the district court's decision in this case.

To take just one example, MetLife has argued throughout this litigation that FSOC acted arbitrarily and capriciously by failing to consider the likelihood that MetLife would experience material financial distress as part of its designation inquiry. *See* MetLife Br. 24-29. The district court agreed with MetLife, ruling that FSOC had improperly departed from its own Final Rule and Interpretive Guidance by failing to conduct a threshold inquiry into the likelihood of MetLife's experiencing material financial distress. *See* JA 802. The Treasury Secretary will be considering this very issue as part of the inquiry ordered by the President,

examining "[w]hether evaluation of a nonbank financial company's vulnerability to material financial distress, under 12 CFR 1310 App. A.II.d.1, should assess the likelihood of such distress." Presidential Memorandum § 1(d), 2017 WL 1421320, at *1.

If the Treasury Secretary concludes—as MetLife argued and the district court ruled—that FSOC is required to consider whether a company under consideration for designation is likely to experience material financial distress, then the appropriate response would be for the government to change its position on that issue in this appeal or abandon the appeal altogether. As this Court has recognized, "'[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal'" of its positions, and a new administration is "'entitled to . . . evaluate priorities in light of the philosophy of the administration.'" *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)). Holding this case in abeyance will provide the Treasury Secretary time to complete his review of FSOC's designation process and enable the new Administration to "reapprais[e]" its position in this case in light of the Secretary's findings. It will also ensure that this Court has the benefit of those findings when resolving the issues presented in this appeal.

Neither the parties nor the public will be prejudiced by a decision to hold this appeal in abeyance, which would simply preserve the status quo by continuing to leave in place the district court's ruling rescinding MetLife's designation. Issuing an opinion during the ongoing review, on the other hand, would deny the new Administration the opportunity to ensure that the government's positions in this litigation are consistent with the findings of the Treasury Secretary's forthcoming report. Moreover, if this Court were to issue an opinion reversing the district court's decision before the Treasury Secretary has completed his review, the opinion would reinstate MetLife's designation upon issuance of this Court's mandate—an outcome that would directly undermine the President's clear instruction to the Treasury Secretary that there should be a "[p]ause of [d]eterminations and [d]esignations" until the Secretary has issued his report examining the designation process. Presidential Memorandum § 3, 2017 WL 1421320, at *2. This Court should therefore permit the Secretary to complete his ongoing inquiry into FSOC's procedures before issuing an opinion in this case.

CONCLUSION

This Court should issue an order holding this appeal in abeyance pending the Secretary of the Treasury's forthcoming report on FSOC's designation process.

Dated: April 24, 2017

Respectfully submitted,

/s/ Eugene Scalia
Eugene Scalia
Counsel of Record
Amir C. Tayrani
Ashley S. Boizelle
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539

Counsel for Appellee MetLife, Inc.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,737 words, as determined by the word-count function of Microsoft Word 2016.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: April 24, 2017

/s/ Eugene Scalia

Eugene Scalia
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Appellee MetLife, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2017, I caused a copy of the foregoing Motion to Hold Appeal in Abeyance to be served with the Clerk of the Court via the Court's CM/ECF filing system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Eugene Scalia
Eugene Scalia
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Counsel for Appellee MetLife, Inc.