Banking and Finance Law Daily Wrap Up, TOP STORY—D.D.C.: Unsealed opinion sheds light on MetLife SIFI reversal, (Apr. 7, 2016)

By Anne Sherry, J.D.

The decision rescinding MetLife's designation as a nonbank SIFI was unsealed, allowing the first look at the D.C. District Court's holding that the designation was arbitrary and capricious. The court held that the Financial Stability Oversight Council acted contrary to its published guidance without explaining, or even acknowledging, the deviation. An additional, independent basis for rescission was FSOC's purposeful refusal to consider the costs of the designation to MetLife (*MetLife, Inc. v. Financial Stability Oversight Council*, March 30, 2016, Collyer, R.).

Going against the guidance. By the time FSOC notified MetLife that the insurer was being considered for SIFI designation, the council's guidance for nonbank SIFI determinations had been published (first for comment, then in final form) for two years. The guidance said that FSOC would look to three factors (leverage, liquidity risk, and maturity mismatch) to assess a nonbank financial company's vulnerability to financial distress. Then, the council would evaluate another three factors (size, substitutability, and interconnectedness) to determine the potential effect of distress. FSOC conflated these two categories, applying all six factors to the impact analysis and skipping over the vulnerability analysis.

FSOC may have fared better had it acknowledged the shift in position and offered a justification for the new policy. Under *FCC v. Fox Television Stations, Inc.* (U.S. 2009), an agency must acknowledge and explain the reasons for a changed interpretation—but it does not have to convince a reviewing court that the new policy is an improvement. The *Fox Television* standard is that the new policy is permissible under the statute, there are good reasons for it, and the agency believes it to be better. Furthermore, under the Dodd-Frank Act, the district court's review of MetLife's designation was constrained to an arbitrary-and-capricious standard deferential to the agency. The court repeatedly stressed that FSOC did not even acknowledge its deviation from guidance, much less explain it.

The guidance also stated that a nonbank financial company could only threaten U.S. stability "if there would be an impairment of financial intermediation or of financial market functioning" sufficient "to inflict significant damage on the broader economy." But FSOC never projected estimated losses, instead summarily treating every possible effect of MetLife's insolvency as grave enough to damage the economy. "This Court cannot affirm a finding that MetLife's distress would cause severe impairment of financial intermediation or of financial market functioning—even on arbitrary-and-capricious review—when FSOC refused to undertake that analysis itself."

Ignoring costs. A second ground for rescission was FSOC's refusal to consider the costs that the SIFI designation imposed on MetLife. MetLife had argued that it was arbitrary and capricious to weaken a company that the regulation was meant to fortify; FSOC countered that Dodd-Frank did not require a cost-benefit analysis. Last term, however, the Supreme Court invalidated an EPA rule that refused to consider the costs of power-plant regulation (*Michigan v. EPA* (U.S. 2015)). There, although the Clean Air Act did not expressly require a cost-benefit analysis, its grant of authority to regulate only if "appropriate" "naturally and traditionally includes consideration of all the relevant factors," the Court held, including cost. "No regulation is 'appropriate' if it does significantly more harm than good."

Dodd-Frank also uses the word "appropriate," and while it only requires FSOC to consider appropriate "risk-related" factors, MetLife argued that the costs of the designation would leave the insurer more vulnerable to financial distress. Because FSOC never responded to this point or considered cost in its determination, it was impossible to know whether the SIFI designation did more harm than good.

In response to the opinion, Treasury Secretary Jacob J. Lew said that Congress had good reasons not to require a formal cost-benefit analysis: "Such a requirement would impair the Council's ability to address the risks of a future financial crisis that could severely damage the financial system and the U.S. economy."

Will FSOC try again? The decision is without question a victory for MetLife, albeit not a total runaway: the court upheld FSOC's determination that MetLife was eligible for SIFI designation, even as it overturned the designation itself. MetLife had argued that its significant foreign activities rendered it ineligible to be a SIFI under Dodd-Frank. Contrary to the insurer's argument, the court held that its foreign activities are "financial" or at the very least "related to" financial activities and should not be excluded when determining if the company met the thresholds for designation.

The case is No. 1:15-cv-00045-RMC.

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Companies: MetLife, Inc.