

[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 RENEWED MOTION TO HOLD APPEAL IN
ABEYANCE PENDING THE SECRETARY OF THE TREASURY’S
FORTHCOMING REPORT ON THE FSOC DESIGNATION PROCESS**

Pursuant to this Court’s Order of May 12, 2017, Appellee MetLife, Inc. (“MetLife”) hereby renews its motion to hold this appeal in abeyance pending issuance of the Secretary of the Treasury’s report regarding the designation process of the Financial Stability Oversight Council (“FSOC”). As explained in MetLife’s initial abeyance motion, that report—which is expected to be completed by October 18, 2017—will address aspects of FSOC’s designation process that the district court found to be flawed when it rescinded MetLife’s designation as well as several other features of the designation process challenged by MetLife. *See* MetLife, Inc.’s Motion to Hold Appeal in Abeyance at 5-7 (Apr. 24, 2017) (“Apr. 24 Mot.”). Because the forthcoming report will reflect the new Administration’s assessment of

agency procedures that are at the very heart of this appeal, the report may prompt the government to change its positions on one or more issues in this appeal or to abandon the appeal altogether. At a minimum, the report may materially inform this Court's consideration of the issues on appeal.

Accordingly, MetLife respectfully requests that the Court continue to hold this appeal in abeyance pending issuance of the Treasury Secretary's report.

FACTUAL BACKGROUND

On April 21, 2017, the President of the United States issued a Memorandum to the Secretary of the Treasury directing him to undertake "a thorough review of the FSOC determination and designation processes" and to issue "a written report to the President within 180 days," a deadline of October 18, 2017. Presidential Memorandum for the Secretary of the Treasury, 2017 WL 1421320, at *1, § 1 (Apr. 21, 2017) ("Presidential Memorandum") (attached as Exhibit A). Among other things, the President ordered the 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 further directed the Treasury Secretary not to vote “for any non-emergency” designations until the review has been completed. *Id.* § 3.

Three days later, MetLife moved the Court to hold this appeal in abeyance pending completion of the Treasury Secretary’s report. *See* Apr. 24 Mot. at 1. In response, FSOC declined to take a position but agreed to a 60-day abeyance “to allow the Council and the Department of Justice to complete their deliberations” regarding the motion. Response to Motion to Hold Case in Abeyance at 1 (May 4, 2017). On May 12, this Court granted a 60-day abeyance period and directed the parties to file motions to govern future proceedings by July 11, 2017. Order of May 12, 2017, at 1.

DISCUSSION

The Court should extend the 60-day abeyance period through the issuance of the Treasury Secretary’s forthcoming report because the report will address several issues that are squarely before the Court in this appeal. Extending the abeyance period will afford the government the opportunity to decide whether any of its positions in this appeal, including its decision to pursue this appeal in the first place, should be reconsidered and will ensure that any opinion issued by this Court is informed by the report’s findings.

It is well-established that a court may exercise its inherent authority to control the disposition of the causes on its docket by holding an appeal in abeyance. *See Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008) (per curiam). Deferring resolution of an appeal is particularly appropriate where, as here, a new administration seeks to “reapprais[e]” the policies and legal positions of its predecessor. *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)). Indeed, the government routinely seeks or consents to abeyance periods when it wishes to reconsider challenged agency action. *See, e.g.*, Order of May 18, 2017, *Am. Petroleum Inst. v. EPA*, No. 13-1108 (D.C. Cir.) (“*API II*”). And this Court regularly grants abeyance requests in order to provide the government the opportunity to consider a possible “reversal of course . . . that, if adopted, would necessitate substantively different legal analysis.” *Am. Petroleum Inst. v. EPA*, 683 F.3d 382, 388 (D.C. Cir. 2012) (“*API I*”); *see also* Apr. 24 Mot. at 3-5 (discussing cases).

Several recent cases in this Court reflect these settled practices. In *West Virginia v. EPA*, for example, the en banc Court granted the EPA’s request that it hold challenges to the agency’s Clean Power Plan in abeyance pending the EPA’s review of the Plan pursuant to the terms of an Executive Order. *See* Order of Apr. 28, 2017, No. 15-1363 (D.C. Cir.). In its request for the abeyance—which was made

after oral argument but before an opinion had been issued—the EPA emphasized that it “should be afforded the opportunity to fully review the Clean Power Plan and respond to the President’s direction in a manner that is consistent with the terms of the Executive Order, the Clean Air Act, and the agency’s inherent authority to reconsider past decisions.” EPA Notice and Motion to Hold Case in Abeyance at 1-2, No. 15-1363 (D.C. Cir. Mar. 28, 2017).

Similarly, in *API II*, this Court granted the EPA’s motion to hold consolidated cases in abeyance based on an Executive Order that directed the agency to review the source performance standards that are being challenged in those proceedings. *See* Order of May 18, 2017, No. 13-1108 (D.C. Cir.). At the EPA’s urging, the Court granted an abeyance period until 30 days after the EPA completes its ongoing review of the challenged rule. *See id.* at 2; *see also* EPA Notice of Executive Order and Motion to Hold Cases in Abeyance at 4-5, No. 13-1108 (D.C. Cir. Apr. 7, 2017) (arguing that “abeyance of these consolidated cases until 30 days after EPA’s review of the rule pursuant to the Executive Order is warranted”).

Likewise, in *Walter Coke, Inc. v. EPA*, this Court granted the EPA’s request to continue oral argument and hold the consolidated appeal in abeyance to enable the new Administration to review the EPA’s startup, shutdown, and malfunction emissions rule, which was being challenged in that litigation. *See* Order of Apr. 24, 2017, No. 15-1166 (D.C. Cir.). The EPA argued that a continuance was appropriate

because “the prior positions taken by the Agency . . . may not necessarily reflect its ultimate conclusions after” the EPA had “closely review[ed]” the challenged agency action. EPA Motion to Continue Oral Argument at 1, No. 15-1166 (D.C. Cir. Apr. 18, 2017); *see also* Order of Apr. 27, 2017, *Murray Energy Corp. v. EPA*, No. 16-1127 (D.C. Cir. Apr.) (continuing oral argument and granting abeyance pending reconsideration of the EPA’s regulations regarding air pollutants from power plants).

This case warrants a similar abeyance period because the Treasury Secretary’s forthcoming report on FSOC’s designation process will address several subjects directly implicated in this litigation and may prompt a “reversal of course” by the government on some or all of those issues. *API I*, 683 F.3d at 388. The areas of overlap between the Secretary’s report and this litigation include whether FSOC must consider the likelihood that a company under consideration for designation will experience material financial distress (*see* Apr. 24 Mot. at 6-7), as well as the following:

1. *Transparency and Due Process.* MetLife has argued throughout this litigation that FSOC’s designation process lacks transparency and ascertainable standards, and therefore violated MetLife’s due process rights. *See* MetLife Br. 41-46, 61-62. Specifically, MetLife has argued that FSOC deprived MetLife of a meaningful opportunity to oppose its designation by refusing to provide MetLife with access to the administrative record during the designation proceedings, denying

MetLife's requests for copies of its decisions designating other insurance companies, failing to articulate clear standards for designation, and permitting the same principals and staff who vote and advise on the designation decision to draft the relevant regulations and develop the record to support designation. Each of these procedural shortcomings in FSOC's designation proceedings is directly relevant to, and thus likely to be addressed by, the Treasury Secretary's ongoing inquiry into whether FSOC's designation process is "sufficiently transparent" and whether it provides companies with "adequate due process." Presidential Memorandum at *1, § 1(a), (b).

2. The Need for Specific, Quantifiable Projections of the Damage a Company's Material Financial Distress Could Cause to the United States Economy. Another issue in this appeal is whether FSOC was required to convert counterparties' raw exposures into estimated potential losses, evaluate the materiality of those estimated losses, and factor in the effect of collateral and other risk mitigants for purposes of determining whether MetLife's material financial distress could threaten the financial stability of the United States. MetLife has argued, and the district court agreed, that FSOC acted arbitrarily and capriciously by failing to do so. *See* MetLife Br. 33-40; JA 803. Given the President's directive that the Treasury Secretary examine whether FSOC should be required to make "specific, quantifiable projections of the damage" that a company's material financial distress

could inflict on the United States economy, the Treasury Secretary's report will likely provide analysis that is relevant to the Court's resolution of this issue. Presidential Memorandum at *2, § 1(e).

3. *Considering the Consequences of Designation.* MetLife has also argued, and the district court agreed, that FSOC acted arbitrarily and capriciously by refusing to consider the effects of designation on MetLife and the broader economy. *See* MetLife Br. 51-56; JA 806-11. This issue substantially overlaps with the Treasury Secretary's inquiry into whether FSOC "adequately consider[s] the costs of any determination or designation on the regulated entity." Presidential Memorandum at *2, § 1(f).

Accordingly, in each of these three respects—among several others—the Treasury Secretary's forthcoming report is likely to address issues that are currently pending before the Court in this appeal. In fact, MetLife's designation is likely to figure prominently in the Treasury Secretary's report because MetLife is one of only four nonbank financial companies to have been designated by FSOC. If the Treasury Secretary's inquiry confirms, as the district court held, that FSOC used a flawed process to designate MetLife, those findings should prompt the government to reconsider its positions in this appeal and potentially drop the appeal altogether. Continuing to hold this case in abeyance will provide the Treasury Secretary time to complete his review and enable the new Administration to "reapprais[e]" its position

in this case in light of the Secretary's findings. *Nat'l Ass'n of Home Builders*, 682 F.3d at 1043 (internal quotation marks omitted); *see also API I*, 683 F.3d at 388 (holding an appeal in abeyance allows the agency to "apply its expertise and correct any errors, preserves the integrity of the administrative process, and prevents piecemeal and unnecessary judicial review").

Neither the parties nor the public will be prejudiced by a decision to continue holding this appeal in abeyance because that decision would simply preserve the status quo by leaving in place the district court's ruling rescinding MetLife's designation. Pressing ahead and issuing an opinion during the Secretary's 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. This Court should 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 extending the abeyance period in this appeal until the Secretary of the Treasury has issued his forthcoming report on FSOC's

designation process and directing the parties to file motions to govern future proceedings in this appeal within 30 days of issuance of the report.

Dated: July 6, 2017

Respectfully submitted,

/s/ Eugene Scalia

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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 1,990 words, as determined by the word-count function of Microsoft Word 2016.

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Dated: July 6, 2017

/s/ Eugene Scalia

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2017, I caused a copy of the foregoing Renewed 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

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EXHIBIT A

2017 WL 1421320 (White House)

The White House

Office of Communications

PRESIDENTIAL MEMORANDUM FOR THE SECRETARY OF THE TREASURY

SUBJECT: FINANCIAL STABILITY OVERSIGHT COUNCIL

April 21, 2017

*1 The White House

Office of the Press Secretary

For Immediate Release

MEMORANDUM FOR THE SECRETARY OF THE TREASURY

The Dodd-Frank Wall Street Reform and Consumer Protection Act, [Public Law 111-203](#) (the “Dodd-Frank Act”), authorizes the Financial Stability Oversight Council (FSOC) to determine that a nonbank financial company's material financial distress or the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities could pose a threat to the financial stability of the United States. If the FSOC makes such a determination, the affected nonbank financial company shall be subject to supervision by the Board of Governors of the Federal Reserve System (Federal Reserve Board) and certain prudential standards. The Dodd-Frank Act similarly authorizes the FSOC to designate certain financial market utilities and financial activities as “systemically important,” and thus subject to certain risk management standards, among other things. These determinations and designations have serious implications for affected entities, the industries in which they operate, and the economy at large. Therefore, it is important to ensure that these processes for making determinations and designations promote market discipline and reduce systemic risk. It is equally important to ensure that, once notified by FSOC that it is under review, any entity under consideration for a determination or designation decision is afforded due, fair, and appropriately transparent process.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, and to promote certainty in the financial markets, I hereby direct the Secretary of the Treasury (Secretary) to take the following actions:

Section 1. Report on FSOC Processes. The Secretary shall conduct a thorough review of the FSOC determination and designation processes under section 113 ([12 U.S.C. 5323](#)) and section 804 ([12 U.S.C. 5463](#)) of the Dodd-Frank Act and provide a written report to the President within 180 days of the date of this memorandum. As part of this review, and along with any other considerations that the Secretary deems appropriate, the Secretary shall consider the following:

- (a) whether these processes are sufficiently transparent;
- (b) whether these processes provide entities with adequate due process;
- (c) whether these processes give market participants the expectation that the Federal Government will shield supervised or designated entities from bankruptcy;
- (d) whether 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;

*2 (e) whether any determination as to whether a nonbank financial company's material financial distress could threaten the financial stability of the United States, under 12 CFR 1310 App. A.II.a, should include specific, quantifiable projections of the damage that could be caused to the United States economy, including a specific quantification of estimated losses that would be likely if the company is not subjected to supervision under section 113;

(f) whether these processes adequately consider the costs of any determination or designation on the regulated entity;

(g) whether entities subject to an FSOC determination under section 113 or designation under section 804 are provided a meaningful opportunity to have their determinations or designations reevaluated in a timely and appropriately transparent manner; and

(h) whether, prior to being subject to an FSOC determination under section 113 or designation under section 804, the entity should be provided with information on how to reduce perceived risk, so as to avoid being subject to such determination or designation.

As part of this review, the Secretary shall include in the required report: the Secretary's conclusions regarding the issues enumerated above; recommendations, as appropriate, on how the FSOC processes for determinations under section 113 and designations under section 804 could be improved; and recommendations for any legislative changes necessary to improve these processes.

Sec. 2. Evaluation and Review of the FSOC. The Secretary shall also evaluate and report to the President on whether the activities of the FSOC related to the determination and designation processes under section 113 and section 804, respectively, are consistent with [Executive Order 13772](#) of February 3, 2017 (Core Principles for Regulating the United States Financial System). In the report, the Secretary should provide, if appropriate, recommendations for legislation or regulations that would ensure that the FSOC and its activities are consistent with the principles set forth in [Executive Order 13772](#).

Sec. 3. Temporary Pause of Determinations and Designations. Pending the completion of this review and submission of the Secretary's recommendations, the Secretary shall, to the extent consistent with law, not vote for any non-emergency proposed determinations under [12 CFR 1310.10\(b\)](#) or any non-emergency proposed designations under [12 CFR 1320.13\(c\)](#).

Sec. 4. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

*3 (b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

2017 WL 1421320 (White House)

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