

Securities Regulation Daily Wrap Up, DODD-FRANK ACT—D.D.C.: MetLife SIFI record should be unsealed, Better Markets says, (Jan. 11, 2016)

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By Anne Sherry, J.D.

The watchdog group Better Markets is pressing forward to publicize the court record in MetLife's battle against the Financial Stability Oversight Council. The insurer, which is disputing FSOC's characterization of MetLife as a systemically important financial institution, argues that Dodd-Frank protects the confidentiality of the information it provided to FSOC. Better Markets retorts that the statute binds FSOC, not the court, which should "trust, but verify" (*MetLife, Inc. v. FSOC*, January 8, 2016).

Better Markets, which also filed an amicus brief supporting FSOC's side of the case, applied for an order to show cause, contingent on its being allowed to intervene. FSOC takes no position on the motion to intervene but asks the court to stop short of entering an order to show cause. MetLife opposes the motion as untimely and asserts that Dodd-Frank's confidentiality requirement binds the court.

Confidentiality under Dodd-Frank. Under Section 112 of Dodd-Frank, FSOC must maintain the confidentiality of the information companies submit. This provision binds FSOC, not the court, Better Markets submits. The group distinguishes the case cited by MetLife for the proposition that a statute requiring confidentiality supersedes the court's inquiry. In that case, the Federal Election Commission went to court with an unsealed petition that publicized an investigation in contravention of statute. Here, FSOC is resisting the unsealing. If Dodd-Frank is held binding on the court, MetLife can raise the statute as its good cause for withholding specific documents.

Intervention. MetLife also argues that Better Markets should not be permitted to intervene because its application lacks a common question of law or fact with the litigation. Any member of the public should be permitted to seek access to sealed records in a case affecting the public, the reply counters. Furthermore, as an amicus, Better Markets has demonstrated a particularized interest in the litigation. Finally, the group is dedicated to promoting financial reform and financial stability, which are the interests implicated by the litigation over the SIFI designation.

Suggested process for unsealing. Both litigants believe that an order to show cause is unnecessary under the right-of-access framework of *U.S. v. Hubbard* (D.C. Cir. 1980). Better Markets does not discuss the *Hubbard* factors in its reply, arguing that the issues should be addressed after the parties have more specifically identified the grounds for their redactions. The reply memorandum sets out a two-step process by which the parties can object to unsealing. The parties would first return to the 3000-page joint appendix, review each redaction, and file a new appendix with fewer redactions. Then the parties would justify any remaining redactions. The fact that this may create additional work "is a problem of the parties' own making," and the litigators have the capacity to take on the project.

The case is No. 15-cv-00045.

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Companies: MetLife, Inc.; Better Markets, Inc.

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