Securities Regulation Daily Wrap Up, DODD-FRANK ACT—House panel takes up 'MetLife hearing' on FSOC, (Nov. 19, 2015)

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The House Financial Services Committee's Subcommittee on Oversight and Investigations heard from academics about the Financial Stability Oversight Council's powers and process for designating non-bank financial institutions as systemically important. The topic has stayed in the news because of General Electric Company's decision earlier this year to take the SIFI off-ramp by selling the bulk of its finance arm in order to refocus on its core manufacturing business, while insurer MetLife, Inc. tries to shed the SIFI moniker by disputing its designation in court.

Subcommittee Chairman Sean Duffy (R-Wis) told the panel that the Dodd-Frank Act's goal was for the FSOC to bring federal financial regulators together, but instead gave the Treasury Secretary a tool by which to override other financial regulators' jurisdiction and "weaponize" the concept of risk management while raising constitutional worries over due process and separation of powers. The chairman also noted that the FSOC's non-bank SIFI designation process offers little chance for appeals and there remain open questions about how the de-designation process will function in practice.

Ranking Member Al Green (D-Tex) often set the tone by reminding legislators that the panel's FSOC hearing was yet another way for MetLife to litigate its case against the FSOC. Representative Green noted that other matters involving MetLife, such as suits regarding gender discrimination, employment, disabled persons, and its alleged shadow insurance practice, will be dealt with by courts, not Congress. He said this "double standard" turned the panel's work into "the MetLife hearing."

Jonathan Macey, the Sam Harris Professor of Corporate Law, Corporate Finance and Securities Law at Yale Law School, testified that the FSOC has an "impossible" job that it has "poorly" handled, in part, because systemic risk is tough to define. He noted that few consequences exist if the FSOC errs by tagging a company with the SIFI label when it is not one, but a finding that a company is not a SIFI when it in fact is one carries high risk, potentially leading to a tendency to over-designate.

According to Hal Scott, Nomura Professor and Director of the Program on International Financial Systems at Harvard Law School and Director of the Committee on Capital Markets Regulation, the FSOC's SIFI designation process needs to be more transparent. He told the panel that the FSOC is a poor substitute for genuine regulatory reform, that it was "ill-advised" to have the FSOC designate non-bank SIFIs as part of its main function, and that the FSOC's designation process should be opened to public comment and cost-benefit analyses.

Robert Hockett, Edward Cornell Professor of Law at Cornell University, Senior Consultant at Westwood Capital Group, and Fellow at The Century Foundation, explained that the FSOC is "in keeping with" the Administrative Procedure Act's balancing of government efficiency and constitutional protections, but also seeks to carry out the Dodd-Frank Act's goal of balancing regulatory "depth" and "breadth." He said the Dodd-Frank Act conception of the FSOC is a product of several factors: existing silos for each financial sector, the more recent financial convergence between insurance companies and commercial banks, and the use of holding companies to bring affiliated entities together.

Adam White, Visiting Fellow at the Hoover Institution, said that while he agreed with President Obama's financial fairness aspirations for the Dodd-Frank Act reforms, the FSOC's track record so far highlights the constitutional "dangers" posed by its wide powers and the lack of public access to its proceedings despite the FSOC's impact on markets beyond the entities it designates as systemically important.

Companies: General Electric Company; MetLife, Inc.

LegislativeActivity: CorporateFinance Derivatives DoddFrankAct FinancialIntermediaries RiskManagement