



Insight

DC Circuit Should Not Jump the Gun in FSOC Case

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Earlier this year [MetLife asked the DC Circuit Court](#) to hold off on issuing an opinion in their court case against the Financial Stability Oversight Council (FSOC) until the Treasury Department completed its report on FSOC as directed by the administration's [Presidential Memorandum](#) from April. The court granted MetLife's request, but only for 60 days, or until July 11th. That means that unless the court extends the abeyance to the full 180 days, it could deliver a ruling on the case well before the Treasury report is due later this fall. Therefore, the court should extend the abeyance for another 120 days to give Treasury ample time to complete the report so that the court will have the full report and all of Treasury's research and findings at its disposal while making its decision.

Specifically, the Presidential Memorandum directs Treasury to “conduct a thorough review of the FSOC determination and designation processes under section 113 and section 804 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:

- whether these processes are sufficiently transparent;
- whether these processes provide entities with adequate due process;
- whether these processes give market participants the expectation that the Federal Government will shield supervised or designated entities from bankruptcy;
- whether evaluation of a nonbank financial company's vulnerability to material financial distress, under 12 CFR 1210 App. A.II.d1, should assess the likelihood of such distress;
- 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;

- whether these processes adequately consider the costs of any determination of designation on the regulated entity;
- 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 matter; and
- 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.”

Considering that in March of this year, after a two year investigation, [the House Committee on Financial Services released a report](#) finding that “FSOC’s nonbank designation process is arbitrary and inconsistent,” it would be wise of the court to gather as much additional information as possible before coming down with its ruling.

Further, as [AAF research](#) has shown, there is no compelling evidence that any life insurer poses a threat to the financial stability of the United States; the section 113 and 804 regimes of designating individual insurance companies as subject to enhanced supervision is flawed both in concept and execution; and it would be preferable to move away from an entity-based approach to systemic risk monitoring and supervision and towards an activities and products based approach.

Since the question in MetLife’s case is whether or not FSOC’s designation was “arbitrary and capricious,” the fact that multiple reports point to the arbitrary and nontransparent nature of the designation process, should lead the court to hold off to see what further evidence Treasury is able to dig up. Even if the court has made up its mind and doesn’t plan on changing its decision, there is absolutely no harm, but great benefit, in putting the final decision on hold to see Treasury’s report.

The stakes are incredibly high in MetLife’s case, as a decision in favor of FSOC sets the precedent both for FSOC and any other oversight agency that it can be arbitrary, capricious, and nontransparent in its activity. As such, at the very least, the abeyance should be extended to the full 180 days as Treasury digs deeper.