Insight

# Impending FSOC Decision Has Larger Policy Implications

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President Trump's Executive Order to reduce regulation says, "It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations."

Last March, MetLife won its case against the Financial Stability Oversight Council (FSOC) arguing that, among other things, FSOC did not conduct a proper cost-benefit analysis when it chose to designate MetLife as a systemically important nonbank institution (SIFI) and subject it to increased regulation. FSOC appealed Judge Collyer's decision, and a decision on the appeal is expected any day. But, if the D.C. Circuit Court rules against MetLife, it's not just MetLife that will be affected.

In ruling against FSOC, Judge Collyer wrote that FSOC had acted "arbitrarily and capriciously" by failing to consider the costs of designating MetLife. She went on to say that a thorough cost-benefit analysis was required not only by the text of Dodd-Frank and basic principles of administrative law, but also by the Supreme Court's recent decision in Michigan v. EPA. If the D.C. Circuit Court rejects this aspect of Judge Collyer's decision, going forward, it will be difficult if not impossible to challenge any (not just financial services-related) regulatory action for lack of a proper cost-benefit analysis.

More specifically, if the D.C. Circuit rules in favor of the government and decides that FSOC was not obligated to undertake a cost-benefit analysis in designating MetLife because Dodd-Frank does not expressly require such, potentially far-reaching precedent would be established for agencies to only consider the costs of regulatory actions when Congress has explicitly required an analysis. As such, Michigan v. EPA would only apply where an agency is acting on a statute with language similar to that in the Clean Air Act (the law at issue in the case), and where an agency is not subject to such specific language, that agency would be legally able to undergo regulatory rulemaking without considering the costs to those being regulated. In short, this is a threat to the entire regulatory relief agenda.

At this point, with a decision imminent and all arguments concluded and briefs filed, there's not much else that can be done. However, if the Trump Administration truly values regulatory reform, it will not let a potential decision in favor of FSOC empower agencies to have such free rein, and it will direct the Department of Justice to drop the appeal before the decision is handed down. It's an obscure legal maneuver at this point, but it's the only way to be certain that agencies won't be able to issue new regulations without consequence going forward.