Blogs
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MetLife v. FSOC: Alternatives to Appeal?

My earlier post speculated on the reasons the D.C. District Court struck down the Financial Stability Oversight Counsel's ("FSOC") designation of MetLife as a non-bank systemically important financial institution ("SIFI"). The court unsealed its opinion on April 7, and my tealeaf reading was generally accurate. FSOC appealed the decision almost immediately. But I wonder if an appeal is the best response to the district court's order? **Quick Fixes** The first ground for rescinding the SIFI designation was FSOC's failure to comply with its own Guidance. The Guidance requires FSOC: "to assess the vulnerability of a nonbank financial company to financial distress" and "to assess how a nonbank financial company's material financial distress or activities could be transmitted to, or otherwise affect, other firms or markets, thereby causing a broader impairment of financial intermediation or of financial market functioning." FSOC's designation identified factors that might cause material financial distress for MetLife and how such distress could affect other financial institutions. But FSOC did not attempt to assess MetLife's vulnerability to financial distress. Moreover:

> FSOC never projected *what* the losses would be, *which* financial institutions would have to actively manage their balance sheets, or *how* the market would destabilize as a result. This Court cannot affirm a finding that MetLife's distress would cause severe impairment of financial intermediation or of financial market functioning—even on arbitrary-and-capricious review—when FSOC refused to undertake that analysis itself. (Emphasis in opinion)

During the hearing, FSOC sought refuge in FCC v. Fox Television Stations, which allows a federal agency to change a policy if it "show[s] that there are good reasons for the new policy." However:

> the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.

Having contended that it followed its Guidance in designating MetLife, FSOC could not consistently claim that it had changed policies in accordance with FCC v. Fox. As far as I know, nothing would prevent FSOC from acknowledging and explaining its departure from the Guidance when redesignating MetLife as a SIFI. Under Fox, FSOC "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." The redesignation process should take less time than the appeal and would squarely comply with the district court's order, which should increase its chances of being affirmed. **Harder Fixes** The second ground rests on the kind of legal reasoning that drives non-lawyers crazy. The Dodd-Frank Act did not require any cost/benefit analysis for a SIFI designation. In Michigan v. EPA, however, the Supreme Court held that "the phrase 'appropriate and necessary' requires at least some attention to cost." Section 113(a)(2) of the Dodd-Frank Act requires FSOC to consider, when making a SIFI designation "(K) any other risk-related factors that the Council deems appropriate." The district court held that because the costs of designation and the resulting prudential regulation might make MetLife more vulnerable to financial distress, FSOC should have considered cost when making the designation. I'm no fan of FSOC, but I think the court's interpretation misses the mark. Subparagraph (K) is permissive; it allows FSOC to consider unspecified risk-related factors when designating a SIFI. But it only requires FSOC to consider those additional factors FSOC considers appropriate, including cost. On the other hand, I'm troubled that, regardless of the statute, FSOC believes that it does not have to consider whether a designation, in the words of Michigan v. EPA, "does significantly more harm than good." As noted in my earlier post, the market's reaction to the order was consistent with MetLife's claim that designation would cause it to "lose billions of dollars in value." In considering redesignation, however, FSOC could reasonably find that, while this would harm MetLife's shareholders, higher prudential standards resulting from SIFI designation would still make MetLife less susceptible to financial distress. Here again, by complying with the order (which reflects a sound policy, even if it misconstrues the statute), FSOC might reasonably expect to have the redesignation affirmed by the district court.

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