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Deference Debate and the Role of Cost-Benefit Analysis in Financial Regulation: MetLife v. Financial Stability Oversight Council

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Deference Debate and the Role of Cost-Benefit Analysis in Financial Regulation: *MetLife v. Financial Stability Oversight Council*

I. Introduction

Following the 2008 financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") to reform the financial regulatory system in the United States.[1] One of Dodd-Frank's primary additions to the financial industry is the creation of the Financial Stability Oversight Council ("FSOC" or "the Council"), which is charged with monitoring the financial industry to ensure that financial institutions do not pose systemic risk.[2] The critical regulatory power of FSOC is its ability to designate nonbank financial institutions as "Systemically Important Financial Institutions" ("SIFI") and subject them to increased regulation by the Federal Reserve Board ("the Fed").[3] Once designated, a firm may only shed the SIFI designation if it proves that the SIFI designation was "arbitrary and capricious."[4]

In December 2014, FSOC voted to designate MetLife, Inc. ("MetLife")[5] a SIFI.[6] MetLife was the fourth nonbank to be designated a SIFI, following American Insurance Group ("AIG"), General Electric Capital Corporation ("GE"),[7] and Prudential Financial, Inc.

1. David Huntington, *Summary of Dodd-Frank Financial Regulation Legislation*, HARVARD LAW SCH. FORUM ON CORP. GOVERNANCE AND FIN. REGULATION (July 7, 2010), https://corpgov.law.harvard.edu/2010/07/07/summary-of-dodd-frank-financial-regulation-legislation/ (giving a history of the Dodd-Frank reform legislation).

2. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 111, 12 U.S.C. § 5321(a)–(b) (2015).

3. Dodd-Frank § 113, 12 U.S.C. § 5323(a)(1).

4. Dodd-Frank § 113, 12 U.S.C. § 5323(h).

5. MetLife is a U.S. based, global provider of insurance, annuities, and employee benefit programs. *See generally About MetLife*, METLIFE, https://www.metlife.com/about/index.html (last visited Jan. 10, 2017).

6. Eric Garcia, *MetLife Faces Challenge to Overturn 'Systemically Important' Designation*, MARKETWATCH (Jan. 14, 2015, 9:36 AM), http://www.marketwatch.com/story/metlife-bfaces-challenge-to-overturn-systemically-important-designation-2015-01-13.

7. On June 28, 2016, GE subsequently successfully shed its SIFI designation by

("Prudential").[8] On January 13, 2015, MetLife challenged FSOC's designation in the United States District Court for the District of Columbia, arguing that the decision to designate MetLife was "arbitrary and capricious."[9] In *MetLife, Inc. v. Financial Stability Oversight Council*,[10] the D.C. District Court agreed.[11] In reaching its determination, the court concluded that while MetLife was eligible to be designated as a SIFI, FSOC's designation was arbitrary and capricious because it both deviated from its own guidance "without acknowledgement or explanation" and also failed to consider the regulatory cost that SIFI designation would impose on MetLife.[12] FSOC appealed the court's ruling, and the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments on October 24, 2016.[13] While possible to frame the Circuit Court's pending decision in terms of the extent of administrative mistakes on FSOC's part, the appellate process has unearthed fundamental debates over the degree of deference that should be given to FSOC in its designation analysis as well as the role of cost-benefit analysis in FSOC's methodology.[14]

This Note examines the district court's decision and discusses the issues raised on both sides of the appeal. This Note proceeds in five parts. Part II describes the purpose of FSOC and its SIFI designation process.[15] Part III discusses both FSOC's rationale for designating MetLife as a SIFI and the district court's ruling.[16] Part IV details the arguments raised on appeal and explores the merits of the arguments.[17] Part V concludes with a discussion of the possible outcome of the

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liquidating a significant portion of its financial business. Press Release, U.S. Dep't of Treas., Financial Stability Oversight Council Announces Rescission of Nonbank Financial Company Designation (June 29, 2016).

8. Fin. Stability Oversight Council, *Financial Stability Oversight Council Designations*, U.S. DEP'T OF THE TREASURY., (June 29, 2016, 9:48 AM), https://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx#nonbank.

9. *See* Paige Brewin, *MetLife's SIFI Designation and Appeal*, 34 REV. BANKING & FIN. L. 435, 440 (2015).

10. 177 F. Supp. 3d 219, 231 (D.D.C. 2016).

11. *See id.* at 230.

12. *Id*.

13. *Oral Argument Calendar*, U.S. Ct. of App. for the D.C. Cir., https://www.cadc.uscourts.gov/internet/sixtyday.nsf/fullcalendar?OpenView&count=1000 (last modified Jan. 20, 2017 5:30 AM).

14. *See infra* Part IV.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part IV.

appeal.[18]

II. BACKGROUND OF THE DODD-FRANK ACT AND THE CREATION OF FSOC

A. Origins of FSOC and Its Purpose

One of the consistent criticisms of federal financial regulation, prior to Dodd-Frank, was the fragmentation and "meaningless formal separation lines among various segments of the financial industry."[19] Despite this criticism, Dodd-Frank largely retained the existing fragmented regulatory structure of the financial system.[20] Instead of overhauling the regulatory structure, legislators created FSOC in an attempt to identify and combat systemic risk.[21]

Dodd-Frank established FSOC with three stated purposes: (1) "to identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace"; (2) "to promote market discipline"; and (3) "to respond to emerging threats to the stability of the United States financial system."[22]

There are ten voting members of FSOC, each the head of a major regulatory agency, as well as one member appointed by the President.[23] The members include the Secretary of the Treasury (who serves as the Chairperson of the Council), Chairman of the Board of Governors of the Federal Reserve System, Comptroller of the Currency, Director of the Consumer Financial Protection Bureau, Chairperson of

18. *See infra* Part V.

19. Saule T. Omarova, *The Dodd-Frank Act, A New Deal for a New Age?*, 15 N.C. BANKING INST. 83, 87 (2011) (explaining that the US silo-based regulatory system, where financial institutions are place in mutually exclusive regulatory categories, "allows for companies to incur high levels of risk hidden from regulators," as they are restricted to their respective regulatory silo).

20. *Id*. While the Office of Thrift Supervision (OTC) was eliminated and merged with the Office of Comptroller of the Currency (OCC), all of the other agencies, such as the Securities and Exchange Commission and the Commodity Futures Trading Commission, were left intact. *Id*.

21. *Id*. at 88–89.

22. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 112, 12 U.S.C. § 5322(a) (2015).

23. Dodd-Frank § 111, 12 U.S.C. § 5321(b)(1).

the Securities and Exchange Commission, Chair of the Federal Deposit Insurance Corporation, the Chairperson of the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency, and the Chairman of the National Credit Union Administration Board, as well as one member with insurance expertise appointed by the President, with advice and consent of the Senate, to serve a six-year term.[24] Additionally, five nonvoting members serve in an advisory capacity.[25]

B. SIFI Designation Process

Section 113 of Dodd-Frank gives FSOC the ability to designate certain nonbank financial companies as systemically important, and subject them to regulation (or heightened regulation) by the Fed.[26] These regulations, new for nonbank companies,[27] can include risk-based capital requirements, leverage limits, liquidity requirements, resolution plan and credit exposure report requirements, concentration limits, a contingent capital requirement, enhanced public disclosures, short-term debt limits, and overall risk management requirements.[28]

Under Dodd-Frank, a nonbank financial institution is defined as a company that is incorporated or organized under United States law and "predominantly engaged in financial activities."[29] There are two independent tests under Section 102 of Dodd-Frank that determine

24. *Id*.

25. Dodd-Frank § 111, 12 U.S.C. § 5321(b)(2). The nonvoting members are: the Director of the Office of Financial Research; the Director of the Federal Insurance Office; a State insurance commissioner, to be designated by a selection process determined by the State insurance commissioners; a State banking supervisor to be designated by a selection process determined by the State banking supervisors; and a State securities commissioner or an officer performing like function, to be designated by a selection process determined by such State securities commissioners. Dodd-Frank § 111, 12 U.S.C. § 5321(b)(2).

26. Dodd-Frank § 113, 12 U.S.C. § 5323(a)(1).

27. Though the Fed already regulated banks and bank holding companies, this section of Dodd-Frank marks a significant expansion of the Fed's powers by including additional nonbanks in its charge. *See* Bernard Shull, *The Impact of Financial Reform on Fed. Reserve Autonomy* 7 (Levy Economics Inst. Working Paper No. 735, 2012), http://www.levyinstitute.org/pubs/wp_735.pdf ("On the recognition that the financial crisis emanated, in part, from the risky activities of investment banks and insurance companies, the Fed is also charged with supervising nonbank financial institutions designated as systemically important (SIFIs) by the FSOC.").

28. Dodd-Frank § 115, 12 U.S.C. § 5325(b).

29. Dodd-Frank § 102, 12 U.S.C. § 5311(a)(4)(B)(i)–(ii).

whether a nonbank financial institution meets the "predominantly engaged in financial activities" qualification.[30] Under the first test, at least 85% of the company's consolidated annual gross revenues must be "derived" from activities that are "financial in nature."[31] Under the second test, at least 85% of the company's consolidated assets must be "related to activities that are financial in nature."[32] Section 4(k) of the Bank Holding Company Act of 1956, defines what constitutes activities that are financial in nature.[33]

When evaluating a nonbank financial institution for potential SIFI designation, Dodd-Frank requires FSOC to consider ten statutory factors.[34] Additionally, there is a catch-all provision, which requires FSOC to consider "any other risk-related factors the Council deems appropriate."[35] In 2012, FSOC issued its interpretive Guidance for Nonbank Financial Company Designations ("Guidance"),[36] which compressed the ten statutory factors (and the additional risk-related catch-all factor) into six categories: (1) interconnectedness; (2) substitutability; (3) size; (4) leverage; (5) liquidity risk and maturity mismatch; and (6) existing regulatory scrutiny.[37] The first three of these categories—size, substitutability, and interconnectedness—serve to

30. Dodd-Frank §102, 12 U.S.C. § 5311(a)(6)(A)–(B).

31. Dodd-Frank §102, 12 U.S.C. § 5311(a)(6)(A).

32. Dodd-Frank §102, 12 U.S.C. § 5311(a)(6)(B).

33. Bank Holding Company Act of 1956 § 4, 12 U.S.C. § 1843(k)(4) (2015).

34. Dodd-Frank §113, 12 U.S.C. § 5323(a)(2). The factors are: (A) "the extent of the leverage of the company"; (B) the extent and nature of the off-balance-sheet exposures of the company"; (C) "the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies"; (D) the importance of the company as a source of credit for households, businesses, and State and local governments and as a source of liquidity for the United States financial system"; (E) the importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities"; (F) the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse"; (G) "the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company"; (H) "the degree to which the company is already regulated by 1 or more primary financial regulatory agencies"; (I) "the amount and nature of the financial assets of the company"; and (J) "the amount and types of the liabilities of the company, including the degree of reliance on short-term funding." Dodd-Frank § 113, 12 U.S.C. § 5323(a)(2).

35. Dodd-Frank § 113, 12 U.S.C. § 5323(a)(2) (listing this factor as factor (K) in the legislation).

36. Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 12 C.F.R. § 1310, App. A (2016).

37. *Id.*

gauge the potential impact of a nonbank financial company's financial distress on the overall economy.[38] The second three—leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny—serve to examine the susceptibility of a company to material financial distress.[39] In its Guidance, FSOC related that "material financial distress" exists when a firm is in "imminent danger of insolvency or defaulting on its financial obligations."[40]

FSOC utilized this six-factor analytical framework to develop two independently sufficient standards through which it can designate a nonbank financial company as a SIFI.[41] Both standards require a two-thirds Council vote, including an affirmative vote from the Chairperson of the Council.[42] The first determination standard is satisfied "if material financial distress at the nonbank financial company could pose a threat to the financial stability of the United States."[43] The second determination standard is satisfied if "the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the nonbank financial company could pose a threat to the financial stability of the United States."[44] While these standards are independent of one another, FSOC noted that there could be significant overlap between the outcome of an evaluation under each standard.[45]

Under the two determination standards, a "threat to financial stability" occurs when there is an "impairment of financial intermediation or of financial market functioning that would be sufficiently severe to inflict significant damage on the broader economy."[46] FSOC identified three channels through which a nonbank financial company's material financial distress could be transmitted

38. *Id*.

39. *Id*.

40. *Id*.

41. 12 C.F.R. §1310, App. A.

42. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 113, 12 U.S.C. § 5323(a)(1) (2015).

43. 12 C.F.R. §1310, App. A.

44. *Id*.

45. *Id*. ("The Council expects that there likely will be significant overlap between the outcome of an assessment of a nonbank financial company under the First and Second Determination Standards, because, in many cases, a nonbank financial company that could pose a threat to U.S. financial stability because of the nature, scope, size, scale, concentration, interconnectedness, or mix of its activities could also pose a threat to U.S. financial stability if it were to experience material financial distress.").

46. *Id*.

through the markets or to other firms, and thus cause damage to the overall economy: (1) exposure, where "a nonbank financial company's creditors, counterparties, investors, or other market participants have exposure to the nonbank financial company that is significant enough to materially impair those creditors, counterparties, investors, or other market participants"; (2) asset liquidation, where a "nonbank financial company holds assets that, if liquidated quickly, would cause a fall in asset prices and thereby significantly disrupt trading or funding in key markets or cause significant losses or funding problems for other firms with similar holdings"; and (3) critical function or service, where "a nonbank financial company is no longer able or willing to provide a critical function or service that is relied upon by market participants and for which there are no ready substitutes."[47]

The only legal recourse for this process offered to SIFI-designated nonbank financial companies under Dodd-Frank[48] is to challenge FSOC's final determination within thirty days in either the United States district court for the judicial district in which the home office of the company is located or the United States District Court for the District of Columbia.[49] In order for a court to rescind the SIFI designation, the designated company must prove that FSOC's final determination was "arbitrary and capricious."[50]

III. METLIFE'S DESIGNATION AND THE D.C. DISTRICT COURT'S RULING

A. FSOC Designation of MetLife and Rationale

On July 16, 2013, the Council notified MetLife that it was being considered for SIFI designation.[51] On October 3, 2014, MetLife

47. *Id*.

48. Companies are notified when they are under review for potential SIFI designation, and can request an oral or written hearing during the process to argue against their designation. *See Financial Stability Oversight Council FAQ's*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/initiatives/fsoc/designations/Pages/nonbank-faq.aspx#8 (last updated Feb. 14, 2015). However, once designated, they must either comply with FSOC or utilize the statutory legal recourse to shed SIFI designation. *Id*.

49. Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 113, 12 U.S.C. § 5323(h) (2015).

50. *Id*.

51. FIN. STABILITY OVERSIGHT COUNCIL, U.S. DEP'T OF THE TREASURY, BASIS FOR THE FINANCIAL STABILITY OVERSIGHT COUNCIL'S FINAL DETERMINATION REGARDING METLIFE, INC. 2 (2014) [hereinafter FINAL DETERMINATION], https://www.treasury.gov/initiatives/fsoc/

requested and FSOC granted, a hearing regarding its potential designation.[52] After reviewing and considering evidence from the hearing, meetings with MetLife representatives,[53] and additional materials sent to the Council by MetLife, FSOC issued a report ("Final Determination") that designated MetLife a SIFI on December 18, 2014, by a vote of nine to one, with Roy Woodall Jr.[54] as the lone dissent.[55]

FSOC designated MetLife a SIFI under the first determination standard.[56] The Council's basis for designating MetLife revolved around the three risk transmission channels set forth in its Guidance: (1) MetLife's exposure to counterparties, creditors, investors, and other market participants; (2) the possibility that if MetLife liquidated its assets, it could trigger market disruptions or difficulties for firms with similar holdings; and (3) MetLife's inability to provide a critical service or function relied upon by other firms.[57] The designation did not imply that MetLife was in any imminent danger of financial insolvency.[58] Rather, the SIFI designation was taken as a precautionary measure, due to FSOC's opinion that material financial distress at MetLife, were it to occur, could pose a threat to the broader economy.[59]

1. MetLife's Exposure to Other Market Participants

In its Final Determination, the Council expressed concern with the fact that large financial intermediaries have significant exposure to MetLife "arising from the company's institutional products and capital markets activities, such as the funding agreements, general and separate

designations/Documents/MetLife%20Public%20Basis.pdf.

52. *Id*. at 3.

53. *Id.* at 2. Staff of Council members met with MetLife representatives twelve times between September of 2013 and September of 2014. *Id*.

54. Financial Stability Oversight Council, S. Roy Woodall Jr., U.S. DEPT. OF THE TREASURY, https://www.treasury.gov/initiatives/fsoc/about/council/Pages/roy_woodall.aspx (last updated Oct. 23, 2012, 9:53 AM) (stating that Roy Woodall was nominated by President Barack Obama to serve on FSOC as the independent voting member with insurance expertise).

55. *See* Brewin, *supra* note 9, at 439.

56. FINAL DETERMINATION, *supra* note 51, at 4.

57. FINAL DETERMINATION, *supra* note 51, at 15.

58. FINAL DETERMINATION, *supra* note 51, at 16.

59. FINAL DETERMINATION, *supra* note 51, at 16 ("The Council's final determination does not constitute a conclusion that MetLife is experiencing, or is likely to experience, material financial distress. Rather, the Council has determined that material financial distress at the company, if it were to occur, could pose a threat to U.S. financial stability.").

account [guaranteed investment contracts], pension closeouts, securities lending agreements, and outstanding indebtedness."[60] Another concern cited under the exposure transmission channel was the potential for MetLife's substantial number of worldwide policyholders[61] to sustain serious losses in the event of MetLife's material financial distress.[62]

2. MetLife's Asset Liquidation

The Council noted that if MetLife were to suffer material financial distress, it could be forced to liquidate assets to meet its financial obligations.[63] Further, the Council noted that MetLife has significant products that could be threatened by non-renewal or termination by counterparties.[64] Additionally, a substantial portion of the company's insurance liabilities can be surrendered in exchange for cash value, and policy owners may borrow against their outstanding policies.[65] FSOC noted that MetLife's leverage, deemed higher than most of its peers, could instigate a large-scale forced liquidation of its assets.[66] In turn, such a liquidation of assets could disrupt trading and impair market functioning, thus straining the overall economy.[67]

3. Ability to Perform a Critical Function or Service

While the Council noted that MetLife was the leader in the life and health insurance market in the United States,[68] it expressed the opinion that the market was competitive enough for other participants to absorb the impact of MetLife's potential failure.[69] The Council stated: "MetLife's share in these generally fragmented and competitive markets

60. FINAL DETERMINATION, *supra* note 51, at 16.

61. MetLife has approximately 100 million policy holders. FINAL DETERMINATION, *supra* note 51, at 16.

62. FINAL DETERMINATION, *supra* note 51, at 16.

63. FINAL DETERMINATION, *supra* note 51, at 16.

64. FINAL DETERMINATION, *supra* note 51, at 16.

65. FINAL DETERMINATION, *supra* note 51, at 4.

66. FINAL DETERMINATION, *supra* note 51, at 16.

67. FINAL DETERMINATION, *supra* note 51, at 16.

68. FINAL DETERMINATION, *supra* note 51, at 25. The Council noted that MetLife's market share in that segment was approximately 15%. FINAL DETERMINATION, *supra* note 51, at 25. Further, MetLife was cited as a significant participant in the corporate benefit funding and annuity product markets. FINAL DETERMINATION, *supra* note 51, at 25.

69. FINAL DETERMINATION, *supra* note 51, at 25.

do not appear large enough to cause a significant disruption in the provision of services if the company were to experience material financial distress."[70]

B. MetLife, Inc. v. Financial Stability Oversight Council—The District Court's Ruling

Following its designation, MetLife utilized its legal remedy under Dodd-Frank and filed a complaint arguing that FSOC's Final Determination was arbitrary and capricious.[71] The District Court for the District of Columbia ruled in MetLife's favor on March 30, 2016, rescinding MetLife's SIFI designation.[72]

The court determined that MetLife was eligible for designation as a SIFI under the statutory test established by Dodd-Frank,[73] however, it held that FSOC's designation was arbitrary and capricious in two ways: (1) by violating its own guidance in failing to assess MetLife's susceptibility to material financial distress before addressing the effects of such distress, as well as by inconsistently applying its own promulgated determination standards; and (2) by failing to consider the regulatory cost to MetLife prior to making its designation.[74] Following the court's ruling, FSOC appealed this ruling to the U.S. Court of Appeals for the District of Columbia Circuit.[75]

1. FSOC's Failure to Adhere to Its Own Guidance

The district court criticized the Council's deviance from its own guidance in MetLife's designation in two ways.[76] First, the court reasoned that FSOC's Guidance for designation divided six categories of analysis into two distinct groups.[77] As discussed earlier, the first

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70. FINAL DETERMINATION, *supra* note 51, at 25.
71. Complaint at *1–3, MetLife, Inc. v. Financial Stability Oversight Council, 177 F. Supp. 3d 219 (D.D.C. Jan. 13, 2015) (No. 15–45).
72. MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219 (D.D.C. 2016).
73. *Id.* at 230.
74. *Id.* at 233–239.
75. Chris Bruce, *MetLife Too-Big-To-Fail Case Set For October Argument*, 107 Banking Rep. (BNA) No. 08 at 286 (Aug. 29, 2016).
76. MetLife, Inc., 177 F.Supp.3d at 233–239.
77. *See id.*

group—size, substitutability, and interconnectedness—was intended to consider the possible impact of the nonbank financial company's financial distress on the U.S. economy.[78] The second group: leverage, liquidity risk and maturity mismatch, and existing regulator structure was intended to "determine the susceptibility of a nonbank financial company to financial distress."[79] MetLife's argument, which the court agreed with, was that FSOC failed to address MetLife's vulnerability to financial distress before addressing the possible effects of that distress.[80] In other words, FSOC used all six categories to examine the impact that MetLife's failure could have on the broader economy, instead of using the first group to discuss the impact and the second to discuss MetLife's susceptibility to financial distress.[81] The court noted that FSOC's Guidance established that only the second group of analytical categories was intended to examine the impact of a company's material financial distress on the broader economy.[82] However, the court reasoned that FSOC's Final Determination regarding MetLife was contradictory to the Guidance, because it specified that all six categories were meant to weigh the potential effects of a company's material financial distress.[83] The court found the deviation between FSOC's Guidance and its Final Determination "undeniably inconsistent" and thus rendered this aspect of MetLife's designation as arbitrary and capricious.[84]

Second, the court held that the Council inconsistently applied its own methodology in its Final Determination by combining its two different determination standards.[85] The court remarked that FSOC merely evaluated MetLife's interconnectedness with other actors in the market, and refrained from determining any possible loss.[86] The court further explained that FSOC's analysis amounted to merely a

78. *See id*.
79. *See id*.
80. ROBERTO J. GONZALEZ ET AL., PAUL WEISS LLP, CLIENT ALERT: RESISTANCE IS NOT ALWAYS FUTILE: THE D.C. DISTRICT COURT DEALS FSOC A SIGNIFICANT BLOW BY RESCINDING METLIFE'S DESIGNATION (2016), https://www.paulweiss.com/practices/litigation/insurance/publications/resistance-is-not-always-futile-the-dc-district-court-deals-fsoc.aspx?id=21716.
81. MetLife, Inc., 177 F. Supp. 3d at 233–35.
82. *Id*.
83. *Id*.
84. *Id*.
85. *Id*. at 238.
86. *Id*.

summation of MetLife's market exposures without considering mitigating factors, and that it assumed that losses relating to those exposures would inflict significant damage on the market and the broader U.S. economy.[87] In other words, the court found that FSOC's reasoning was in line with the second determination standard, where a company's nature, scope, size, scale, concentration, interconnectedness, or mix of those activities alone was enough to pose a threat to the financial stability of the United States.[88] However, FSOC invoked the first determination in its analysis, where it must be established that a nonbank financial institution's material financial distress could pose a threat to the broader economy.[89] Regarding FSOC's deviance from its own guidance, the court stated that FSOC was required to either maintain its two promulgated standards, or explain its deviance from them.[90] Having done neither, the court found that FSOC's reversed use of its own standards was arbitrary and capricious.[91]

2. Failure to Consider Cost

In addition to finding that the Council's two deviations from its own guidance was arbitrary and capricious, the court offered one further mistake on FSOC's part: failure to consider the cost to MetLife of its SIFI designation.[92] The district court relied on the United States Supreme Court's decision in *Michigan v. Environmental Protection Agency*[93] in determining that cost was a relevant factor for an administrative agency to consider when deciding whether to regulate an entity.[94] The court noted that although cost was not explicitly mentioned as a factor in the Dodd-Frank legislation pertaining to SIFI designation,[95] regulation is not "appropriate" if it does significantly more harm than good, and thus a cost-benefit analysis must be

87. *Id.*
88. *Id.* at 238.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. Michigan v. Envt'l Prot. Agency, 135 S. Ct. 2699 (2015).
94. MetLife, Inc., 177 F. Supp. 3d at 239.
95. However, Dodd-Frank does require a consideration of "all appropriate risk factors." Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") § 113, 12 U.S.C. § 523(a)(2)(K)(2015).

conducted when designating SIFIs.[96]

After determining that cost was an applicable factor for the Council to consider when deciding to designate a company, the court deemed the Council's decision to ignore cost arbitrary and capricious.[97] In reaching this determination, the court noted Dodd-Frank's "command" to consider all appropriate risk factors in Section 113(a)(2)(K).[98] The court's analysis centered on MetLife's argument, which FSOC failed to address, that imposing billions of dollars in cost due to increased regulation could actually leave the company more vulnerable to material financial distress.[99] In this regard, the court held that because FSOC did not consider cost as part of its designation calculus, determining whether the designation caused more harm than good was "impossible," and thus the Final Determination was arbitrary and capricious.[100]

3. Pending Appeal

FSOC appealed the ruling, claiming the court's reasoning was "profoundly mistaken," and that the decision left "one of the largest, most complex, and most interconnected financial companies in the country" without vital regulatory oversight deemed necessary by Congress.[101] The D.C. Circuit heard arguments on October 24, 2016.[102] The three judge panel selected to hear the arguments included Judges Sri Srinivasan and Patricia Millett, both appointed by President Barack Obama, as well as Judge Raymond Randolph, who was appointed by President George W. Bush.[103]

96. MetLife, Inc. 177 F.Supp.3d at 240.
97. *Id.* at 242.
98. *Id.*
99. *Id.*
100. *Id.*
101. Brief of Appellant at *1–2, MetLife, Inc. v. Fin. Stability Oversight Council, No. 16-5086, 2016 WL 3356866 (C.A.D.C. June 16, 2016).
102. *Oral Argument Calendar*, *supra* note 13.
103. Andrew Ackerman, *Majority of Judges in MetLife Appeal Appointed by Obama*, WALL ST. J., (Sept. 26, 2016, 3:04 PM), https://www.wsj.com/articles/majority-of-judges-in-metlife-appeal-appointed-by-obama-1474916670.

IV. THE CRITICAL ISSUES UNDERLYING *METLIFE V. FSOC* ON APPEAL

One possible view of the district court's decision is that FSOC committed an "administrative foot-fault" in its analysis by mixing its determination standards.[104] Under this view, FSOC could simply rework its analysis and re-designate MetLife using a more stringent analysis.[105] However, the issues raised on appeal suggest that there are fundamental questions underlying FSOC's designation framework, including the level of deference that FSOC is to be allowed in its designation analysis, as well as the role of cost-benefit analysis in FSOC's judgments.[106] The debate over deference as well as the role of cost-benefit analysis, and the merits of the competing arguments, are explored further in this Part.

A. The Level of Deference Shown to FSOC

One of the key issues that arises from this case is the level of deference that courts should give to FSOC in its designation analysis.[107] Deference to FSOC manifests itself in two specific ways: (1) the extent FSOC is required to assess the degree of MetLife's vulnerability to material financial distress[108] and (2) the extent to which FSOC must assess the impact of MetLife's distress on the broader economy.[109]

1. Extent of Vulnerability Analysis Required by FSOC

The regulatory view, espoused by FSOC in its appellate brief, is that neither Dodd-Frank nor the Guidance requires FSOC to assess the probability of a company's vulnerability to financial distress or losses.[110] FSOC argued that the statutory language in Dodd-Frank was created with the intent of regulating in light of the "inherent uncertainty of financial crises" and that the statute only requires an assertion of

104. GONZALEZ, *supra* note 80.
105. GONZALEZ, *supra* note 80.
106. *See* Chris Bruce, *MetLife-FSOC On Appeal: Four Issues to Watch*, 107 Banking Rep. (BNA) No. 14 at 507 (Oct. 17, 2016).
107. *Id.*
108. *Id*.
109. Reply Brief for Appellant, at *11–13, MetLife, Inc. v. Fin. Stability Oversight Council, No. 16-5086, 2016 WL 3356866 (C.A.D.C. Sept. 09, 2016).
110. *Id.* at *23.

whether a company's material financial distress could pose a threat to the economy, not necessarily a detailed forecast of an impending company collapse and its effects.[111]

Similarly, the FSOC articulated that its Guidance did not establish that it would examine the probability that a company would experience financial distress.[112] Rather, the Guidance categories are "interrelated" and that the three vulnerability categories created by the Guidance are intended to "shed light on the effects that distress could have on the company," and how the company might respond if faced with material financial distress.[113]

In contrast, MetLife argued that FSOC, in its Final Designation, violated its Guidance and Dodd-Frank's statutory framework by failing to assess MetLife's vulnerability to material financial distress.[114] MetLife claimed that FSOC made an "unambiguous commitment" in both its Final Determination and interpretive Guidance to assess the likelihood of the potential SIFI experiencing material financial distress.[115]

Furthermore, MetLife insisted that Section 113(a)(2) of Dodd-Frank requires an assessment of a company's susceptibility to material financial distress.[116] FSOC is required to consider vulnerability as an "appropriate risk-related factor" under Section 113(a)(2)(K); it would be unreasonable for FSOC to subject a company to the costs and burdens

111. *Id*. ("[A]lthough the Council's analysis was based on extensive qualitative and quantitative analyses, the Council recognized that 'financial crises can be hard to predict and can have far reaching and unanticipated consequences." The statute directs the Council to determine whether a company's material financial distress 'could pose a threat,' and does not contemplate that he Council will forecast the collapse of the next financial bubble and predict the specific effects it will have on particular companies."). Reply Brief for Appellant, *supra* note 109, at *41–44.

112. FSOC noted that the district court misinterpreted the guidance as requiring FSOC to conduct a separate analysis regarding the likelihood of financial distress at MetLife. *Id*. FSOC stated that "While the Council's guidance identified specific issues that it intended to address in considering the statutory factors, it never stated that it would perform a separate analysis of the type envisioned by the district court." *Id*.

113. Brief for Appellant, *supra* note 109, at *29.

114. Brief for Appellee at *23, MetLife, Inc. v. Financial Stability Oversight Council, 201 No. 16-5086 (C.A.D.C. Aug. 15, 2016).

115. *Id*. MetLife's appellate brief also charged FSOC with revisionism, stating that its discussion of leverage, liquidity risk and maturity mismatch, and existing regulatory scrutiny in its initial appellate brief was not intended to be analyzed regarding the effects of a company's financial distress on other market participants and broader economy. *Id.* at *26.

116. *Id.* at *29.

of enhanced federal oversight in the absence of a plausible risk that the company will actually experience material financial distress.[117]

Finally, MetLife asserted that FSOC improperly assumed that distress at MetLife was more severe than the definition of material financial distress in its interpretive Guidance and Final Determination.[118] Essentially, MetLife posited that FSOC abandoned its own definition of material financial distress, defined in its final rule and interpretive Guidance as "imminent danger of insolvency," and instead assuming more dire levels of distress.[119] MetLife argued that FSOC "moved the goalposts" in order to craft an effective SIFI designation for MetLife.[120]

2. Failure to Quantify How MetLife's Distress Could Impact the Broader Economy

Keeping with its statutory requirements and Guidance, FSOC's argument is that it assessed whether MetLife's material financial distress could pose a threat to the overall U.S. financial system.[121] FSOC focused on the ways that MetLife's distress could impact the economy.[122] FSOC contended that the district court "did not question" FSOC's conclusion that MetLife's material financial distress could pose a threat to U.S. financial stability, but faulted the regulatory body for not predicting "what the losses would be" or "how the market would destabilize" as a consequence of MetLife's distress.[123] FSOC claimed that its Guidance "contains no suggestions" that it must delineate the specific causes and effects of MetLife's failure.[124] Furthermore, FSOC suggested that its analysis went beyond a summation of MetLife's assets and exposures as found by the district court.[125]

MetLife alternatively argued that FSOC's final designation

117. *Id.* at 30.
118. *Id.* at 31.
119. Brief for Appellee, *supra* note 114, at *32.
120. Brief for Appellee, *supra* note 114, at *32.
121. Brief for Appellant, *supra* note 101, at *39.
122. Brief for Appellant, *supra* note 101, at *41–44 (noting that "Metlife could destabilize the financial system" through exposure transmission and asset liquidation channels).
123. Brief for Appellant, *supra* note 101, at *46.
124. Brief for Appellant, *supra* note 101, at *47.
125. Brief for Appellant, *supra* note 101, at *47.

analysis regarding exposure and asset liquidation was inconsistent with its interpretive Guidance and Dodd-Frank.[126] In the Final Determination and interpretive Guidance, FSOC stated that material financial distress at a nonbank financial company could pose a systemic risk to U.S. financial stability only if "an impairment of financial intermediation or of financial market functioning" was sufficiently "severe to inflict significant damage on the broader economy."[127] According to MetLife, FSOC abandoned this analytical standard by simply tallying raw exposures and total assets while refusing to assess potential losses from those exposures.[128] Further, MetLife insisted that in tallying, FSOC relied on unjustified assumptions and guesswork, rather than evidence-based judgments.[129]

B. The Role of Cost-Benefit Analysis in FSOC's Designation Process

MetLife's position regarding the cost-benefit aspect of the decision is that FSOC is required to consider the costs of designation under the final catch-all risk factor established in Dodd-Frank.[130] MetLife's argument for inclusion is that imposing the increased capital requirements could weaken the company, thus rendering it more susceptible to material financial distress.[131] Likening the catch-all factor to a similar provision in *Michigan v. Environmental Protection Agency*,[132] MetLife contends that a cost consideration falls under the "risk-related factor" penumbra of Dodd-Frank's statutory factors in Section 113(a)(2) and thus merits a requirement that FSOC weigh the costs and the benefits of designation.[133]

The regulatory stance, according to FSOC, is that the ten statutory factors established in Dodd-Frank do not relate to the costs

126. Brief for Appellee, *supra* note 114, at *32.
127. Brief for Appellee, *supra* note 114, at *32.
128. Brief for Appellee, *supra* note 114, at *33.
129. Brief for Appellee, *supra* note 114, at *34.
130. Brief for Appellee, *supra* note 114, at *51.
131. Brief for Appellee, *supra* note 114, at *54.
132. In *Michigan*, the Supreme Court held that a provision of the Clean Air Act that directs the EPA to regulate power plants if it "finds such regulation is appropriate and necessary" implies a requirement to weigh the costs of regulation versus the benefits. Michigan v. Envt'l Prot. Agency, 135 S. Ct. 2699, 2707 (2015).
133. Brief for Appellee, *supra* note 114, at *54.

that designation may impose on the company, because the factors are only meant to weigh whether a company's material financial distress could pose a threat to the country's financial stability.[134] Further, the statute grants FSOC broad designation authority, and therefore it only needs to consider risk-related factors that it deems appropriate.[135]

Additionally, the regulatory argument is that *Michigan* itself is not directly applicable to the cost-benefit debate in this case.[136] FSOC contends that the district court misapplied the rule in *Michigan*, because the underlying statute in that case did not indicate the types of factors that should guide the EPA's decision-making process, whereas Dodd-Frank explicitly lists the factors that are meant to guide FSOC in its regulatory mission.[137] Additionally, as noted above, FSOC argues that even if regulatory cost could be considered under the catch-all statutory factor, Dodd-Frank bestowed discretion as to whether that factor should be "deemed appropriate" by FSOC.[138]

C. Analysis of the Competing Views

1. Competing Interpretations of FSOC's Guidance

One key turning point in evaluating the validity of both FSOC and MetLife's argument is the extent to which FSOC's Interpretive Guidance and Dodd-Frank's statutory framework requires a vulnerability assessment.[139] A compelling argument, filed in an amici curiae brief, is that the district court misinterpreted FSOC's reference to vulnerability in its interpretive Guidance as a requirement that it consider the likelihood of a firm's failure.[140] The reference to

134. Brief for Appellant, *supra* note 101, at *51.
135. Brief for Appellant, *supra* note 101, at *52.
136. Brief for Appellant, *supra* note 101, at *52.
137. Brief for Appellant, *supra* note 101, at *52.
138. Brief for Appellant, *supra* note 101, at *53.
139. Brief of Amici Curiae Scholars of Insurance and Financial Regulation in Support of Appellant and Reversal, at *4, MetLife, Inc. v. Fin. Stability Oversight Council (2016) (No. 16-5086) WL 3453715 (C.A.D.C. June 23, 2016) [hereinafter Brief of Amici Curiae in Support of Appellant].
140. *Id*. ("The court further erred by misinterpreting the Council's reference to "vulnerability" in its interpretive guidance to create a requirement that the Council consider the likelihood of a firm's financial failure – even though such a requirement is manifestly inconsistent with the Dodd-Frank Act's scheme for nonbank financial companies.").

vulnerability does not necessarily mandate that FSOC undertake an exhaustive vulnerability analysis.[141] Furthermore, one could argue that when clarifying the ambiguity in the relevant regulatory guidance, the agency—not the courts—should be afforded deference as to the correct reading.[142] This pro-regulatory view encompasses a "well-settled" aspect of administrative law.[143] According to one law professor, the district court contradicted this aspect of administrative law by favoring its own understanding by giving its understanding of FSOC's Guidance to FSOC's own interpretation.[144]

Finally, while a quantification of MetLife's vulnerability to material financial distress would certainly be useful, it might not actually be possible.[145] In an amicus brief on appeal, the Scholars of Insurance and Financial Regulation group noted that there was no "plausible way" for FSOC to meaningfully quantify the likelihood that material financial distress at MetLife could impair market functioning.[146] Such a calculation would require a prediction of the likelihood that a systemic crisis would occur at a future point.[147] The amicus brief noted that this would be impossible, and thus all that can be required in FSOC's analysis is whether there is some risk of a systemic crisis.[148]

However, amicus briefs filed in support of MetLife's position note that there are two methods that could help with a quantitative vulnerability assessment: stress testing and value-at-risk models.[149]

141. In other words, FSOC might only be required to address vulnerability, rather than conduct a thorough assessment. Brief for Appellant, *supra* note 101, at *37.

142. Bruce, *supra* note 106.

143. Bruce, *supra* note 106.

144. Bruce, *supra* note 106 (quoting Saule Omarova, professor of law at Cornell University).

145. Jared Bernstein, *Financial Reform and MetLife: The Judge Got it (Mostly) Wrong*, WASH. POST. (Apr. 12, 2016) https://www.washingtonpost.com/posteverything/wp/2016/04/12/financial-reform-and-metlife-the-judge-got-it-mostly-wrong/?utm_term=.a56ef2c51e4f.

146. Brief of Amici Curiae in Support of Appellant, *supra* note 139, at *4.

147. Brief of Amici Curiae in Support of Appellant, *supra* note 139, at *12.

148. Brief of Amici Curiae, *supra* note 139, at *12 ("[I]f there were enough information to permit an observer to predict that a crisis would emerge next year, then that crisis would either be (1) avoidable, in which case market actors would avoid it; or (2) unavoidable, in which case market actors would immediately react and the crisis would occur now. All we can say in advance is that there is *some* risk of a systemic crisis.")

149. Brief of Amici Curiae Academic Experts in Fin. Regulation in Support of Appellee and Affirmance at *25–26, MetLife, Inc. v. Fin. Stability Oversight Council, No. 16-5086, 2016 WL 4440274 (C.A.D.C. Aug. 22, 2016) [hereinafter Brief of Amici Curiae for

Stress testing, notably used on banks and bank holding companies, provides information on expected losses to a company over a certain time period, which could point to a workable estimate of a nonbank company's vulnerability to material financial distress.[150] Additionally, value-at-risk is a method of statistically modeling the risk of investments, but estimating how such investments might lose value under various market conditions and time periods.[151] The methods complement each other, and could be used by FSOC to measure targeted companies' risk exposure and vulnerability in a designation analysis.[152] Thus, these two methods provide a compelling counter to the regulatory argument that FSOC is not capable of undertaking a quantitative assessment of a company's vulnerability to financial distress.[153]

2. The Cost-Benefit Debate

While *Michigan* presents a compelling case to read in a cost-benefit requirement to the FSOC-relevant Dodd-Frank provisions, it is distinguishable from MetLife in one vital respect.[154] The provision in Dodd-Frank explicitly listed the factors that are meant to guide FSOC in its designation process, all of which revolved around risk and did not involve cost.[155] In contrast, the underlying statute in *Michigan* was not nearly as specific with its guiding factors.[156] Thus, it is possible that *Michigan* might not be directly relevant to MetLife's decision because the Dodd-Frank factors are not intended to be an exhaustive list of the factors appropriate for designating SIFIs.[157] Even if *Michigan* is not distinguishable, the viability of conducting a cost-benefit analysis in

Appellee].

150. Brief of Amici Curiae for Appellee, *supra* note 149, at *24–26.

151. Brief of Amici Curiae for Appellee, *supra* note 149, at *25.

152. Brief of Amici Curiae for Appellee, *supra* note 149, at *25-26.

153. A collection of law professors noted that had FSOC used the two methodologies, "it could not have made the determination that it did." Brief of Amici Curiae for Appellee, *supra* note 149, at *6.

154. Bruce, *supra* note 106.

155. Bruce, *supra* note 106.

156. Bruce, *supra* note 106.

157. Gillian Metzger, a professor of law at Columbia Law School, noted that the D.C. Circuit will likely grapple with how to read and apply *Michigan v. EPA* to MetLife's case. Bruce, *supra* note 106.

systemic risk scenarios is a legitimate issue.[158]

There is also considerable debate as to whether a cost-benefit analysis is actually possible for FSOC to calculate.[159] One barrier to creating such an analysis is the inability of regulators to accurately predict costs to firms because the actual act of designation creates variables in how firms operate.[160] Firms are not static entities; they actively manage their capital and operations in response to regulation.[161] For example, GE unloaded over $200 billion in lending assets in response to its SIFI designation, which subsequently led FSOC to rescind its designation of the company.[162] In fact, MetLife itself separated its U.S. retail segment from the rest of the company prior to the district court's decision, partially to avoid the regulatory impact of increased federal regulation as a result of SIFI designation.[163] While it might be possible to predict the costs of a financial institution in carrying an increased amount of capital,[164] the prior examples illustrate that companies are constantly evolving, and FSOC's ability to accurately predict costs of regulation on these malleable entities might not be as clear cut as it would appear.[165]

Second, even if an accurate cost of imposed regulation on a nonbank financial company could be calculated, the benefits side of a cost-benefit equation would be difficult to ascertain.[166] In this case, the avoidance of a financial recession[167] would be the benefit of designation.[168] Because financial recessions are statistically unlikely to

158. GONZALEZ, *supra* note 80.

159. GONZALEZ, *supra* note 80.

160. GONZALEZ, *supra* note 80.

161. GONZALEZ, *supra* note 80.

162. *See* Rick Clough, *GE Says Too-Big-to-Fail Exit Puts Stamp of Approval on Overhaul*, BLOOMBERG (June 29, 2016), https://www.bloomberg.com/news/articles/2016-06-29/ge-wins-regulatory-approval-to-shed-too-big-to-fail-designation (explaining that GE was able to shed its SIFI label by unloading businesses such as vehicle fleet financing, commercial real estate restaurant lending, and online banking, and only retaining financial units that support GE's manufacturing operations).

163. GONZALEZ, *supra* note 80.

164. Bernstein, *supra* note 145.

165. GONZALEZ, *supra* note 80.

166. Bernstein, *supra* note 145.

167. The consequence of a failing SIFI, in a worst-case scenario, would be severe market failure or recession; thus, the ultimate benefit of designation is preventing the failure of a SIFI and a resulting recession. Bernstein, *supra* note 143.

168. Bernstein, *supra* note 145. Jared Bernstein, a senior fellow at the Center on Budget and Policy Priorities, noted that conducting a cost-benefit analysis would be a "highly

occur, yet significantly impact the broader economy, accurately predicting or calculating the likelihood and effect of their occurrence is exceedingly difficult.[169] Further, other aspects of a recession, such as the long-term unemployment effects, as well as the effect on homeowners losing their homes, are nearly impossible to establish.[170] Thus, while the cost side of a cost-benefit analysis might theoretically be possible, it would be frustratingly difficult for FSOC to quantify or otherwise measure the beneficial effects of SIFI designation.[171]

V. CONCLUSION

While possible to view the court's ruling as a simple technical decision based on FSOC's failure to adhere to its own interpretive Guidance, the decision raises substantive and intricate questions on appeal.[172] First, there is an important dialogue regarding the flexibility that FSOC should be given regarding its decision-making process.[173] In general, FSOC should be given leeway in interpreting and applying its own Guidance in accordance with standard administrative law principles.[174] However, in this case, the lack of clarity between FSOC's Final Determination and its Guidance regarding vulnerability assessments goes beyond this standard deference.[175] If nonbank companies are to be subject to designation as SIFIs and increased regulation, the Guidance promulgated by FSOC should provide clear standards as to how exactly the risk factors in Dodd-Frank will trigger this SIFI designation.[176] As it stands, FSOC's Guidance seems to require it to assess a potential SIFI's vulnerability to material distress; thus, FSOC must either update its Guidance to incorporate its current

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unrealistic endeavor." *Id; see also* GONZALEZ, *supra* note 80.

169. Bernstein, *supra* note 145.

170. Bernstein, *supra* note 145.

171. Bernstein, *supra* note 145.

172. *See* Norbert Michel, *MetLife Wins First Legal Challenge To SIFI Process, Still Need To Get Rid Of FSOC*, FORBES (Apr. 18, 2016), http://www.forbes.com/sites/norbertmichel/2016/04/18/metlife-wins-first-legal-challenge-to-sifi-process-still-need-to-get-rid-of-fsoc/#29c765c171c5 (explaining that while MetLife may have won the case on technical grounds, the ruling means that FSOC will now be burdened with much more stringent analytical requirement).

173. Bruce, *supra* note 106.

174. Bruce, *supra* note 106.

175. Brief of Amici Curiae for Appellee, *supra* note 147, at *31.

176. GONZALEZ, *supra* note 80.

interpretation or utilize some sort of methodology, such as stress testing or value-at-risk models, to assess vulnerability.[177]

Second, the cost-benefit requirement debate, highlighted by the district court's opinion, also presents a question of the role of cost-benefit analysis in FSOC's regulatory methodology.[178] *Michigan* is likely distinguishable from this case because Dodd-Frank lists the factors that FSOC must consider, with the catch-all factor applicable only at FSOC's discretion.[179] This directly contrasts with the relevant statutory language in *Michigan*, which requires the EPA to consider *all* "appropriate" factors.[180] This distinction, coupled with the difficulties present in calculating the costs versus the benefits of designation,[181] likely renders null the cost-benefit requirement imposed by the district court.[182]

The outcome of this appeal also rests within a larger context of the debate over the role and scale of regulators and the deference judges ought to give to federal financial regulators.[183] The fact that two of the three judges selected to sit on the panel for the D.C. Circuit's hearing were appointed by President Obama does not bode well for MetLife and its appeal.[184] Edward Mills, an analyst at investment bank FBR & Co., stated that the panel was a "bad draw" for MetLife, opining that the two judges appointed by President Obama are likely to be more deferential to FSOC and the government's scope of authority than the district court.[185] However, the election of President Donald J. Trump looms large over this matter: FSOC is reportedly an aspect of Dodd-Frank that the present administration is considering eliminating entirely.[186] Thus, the debate over MetLife's designation may prove to be a moot

177. GONZALEZ, *supra* note 80.

178. Bernstein, *supra* note 145 (stating that those familiar with the legal issues surrounding this aspect of the judgment deem the aspect unlikely to survive the appeal).

179. Reply Brief for Appellant, *supra* note 109, at *24.

180. Reply Brief for Appellant, *supra* note 109, at *24.

181. *See supra* Part IV.C.

182. *See* GONZALEZ, *supra* note 80 (finding that the mechanics of requiring a cost-benefit analysis under Dodd-Frank would leave an "open question" to regulators).

183. Bruce, *supra* note 106.

184. Ackerman, *supra* note 103.

185. Ackerman, *supra* note 103. Further, Robert Jackson of Columbia law school was quoted as saying: "If MetLife was hoping for this to be affirmed, they've got to be disappointed in this panel." *Id.*

186. John Heltman, *FSOC on Chopping Block After Republican Victories*, AM. BANKER (Nov. 9, 2016).

discussion, even if the circuit court rules in FSOC's favor.[187]

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187. *Id*.