ORAL ARGUMENT NOT SCHEDULED

No. 16-5086

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

METLIFE, INC.,
Plaintiff-Appellee,

v.

FINANCIAL STABILITY OVERSIGHT COUNCIL,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia (No. 14-0045 (RMC))

BRIEF *AMICUS CURIAE* OF BEN S. BERNANKE AND PAUL A. VOLCKER IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT REGARDING CONSENT TO FILE, AUTHORSHIP AND MONETARY CONTRIBUTIONS

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* Ben S. Bernanke and Paul A. Volcker represents that all parties have been sent notice of the filing of this brief. All parties have either consented or taken no position; no party has objected to the filing of the brief.

Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amici* who are signatories to this brief and any other *amici* who had not yet entered an appearance in this case as of the filing of Appellant's brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellant.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellant.

III. RELATED CASES

Reference to consolidated cases pending before this Court that challenge a related agency action appears in the Brief for Appellant.

Dated: June 23, 2016

By: /s/ Michael Bradfield
Counsel for Amici Curiae

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Identity of Amici Curiae and Their Interest in MetLife v. FSOC

Amici, Ben S. Bernanke, and Paul A. Volcker, are former officials who served in very senior positions in various agencies of the U.S. Government focusing on the economy and on the financial system. They have been, over a long period of professional activity in finance, deeply concerned with the problem of systemic risk and with government policy and administrative responsibilities for maintaining financial stability domestically and internationally. Amici were in office during the financial crisis or were part of the group of officials that helped to craft the Dodd-Frank Act, which established the Financial Stability Oversight Council ("FSOC").

Amici are therefore fully familiar with the issues that Congress has directed FSOC to address, and have extensive experience and knowledge of how large nonbank financial institutions such as insurance companies can propagate systemic risk through nontraditional insurance activities that are not addressed by functional regulations. Amici have studied historical financial crises, observed firsthand the recent crisis, and have a strong interest in protecting the broader economy from the devastating consequences of such events. Amici also have a thorough understanding of the financial regulatory system from decades of experience working in various agencies. In this brief, Amici submit for the consideration of the Court their analysis of the issues in this case and the basis for their conclusions

formulated based on their experience.

Amici's individual affiliations, credentials, publications, and some relevant activities are set forth below. Their affiliations are given for purposes of identification only and do not indicate that the institutions with which they are affiliated endorse the contents of this brief.

Amicus Ben S. Bernanke is Distinguished Fellow in Residence with the Economic Studies Program at the Brookings Institution. He was a member of the Federal Reserve Board from 2002-2005, served for a brief period in 2005 as Chairman of the Council of Economic Advisors prior to his nomination as Chairman of the Board of Governors of the Federal Reserve System, served in that capacity for two terms from 2006 to 2014, and was a member of FSOC from the time of its formation until the end of his term as Federal Reserve Chairman. Prior to his government posts, he was, from 1979 to 2002 in various positions as a professor of economics at Princeton University, the Stanford Graduate School of Business, the Massachusetts Institute of Technology and New York University. Chairman Bernanke is a renowned expert on the Great Depression, and as Federal Reserve Board Chairman played a key role in dealing with the 2007-2009 financial crisis. Mr. Bernanke described his experience in combatting the crisis in his memoir "The Courage to Act, A Memoir of a Crisis and Its Aftermath" (2015).

Amicus Paul Volcker is Chairman of the Volcker Alliance, Inc., a non-profit

charitable corporation, launched in 2012 to address the challenge of effective execution of public policies and to rebuild public trust in government, focusing on partnering with other organizations—academic, business, governmental, and public interest groups—to strengthen professional education for public service, conduct needed research on government performance, and improve the efficiency and accountability of governmental organization at the federal, state, and local levels. He previously served as Chair of the President's Economic Recovery Advisory Board from 2009 to 2011, Chairman of the Board of Governors of the Federal Reserve System from 1979 to 1987, President of the Federal Reserve Bank of New York from 1975 to 1979, and Undersecretary of the Treasury from 1969 to 1974. Based on this extensive government experience at the U.S. Treasury and at the Federal Reserve, and thereafter as an advisor to Presidents, Mr. Volcker is a universally acknowledged authority on financial stability and systemic risk.

INTRODUCTION AND BACKGROUND

This appeal is about whether the District Court properly rescinded the Final Determination by FSOC to designate MetLife to be supervised by the Federal Reserve Board and subject to prudential standards established by the Board. The authority to make this designation was provided by Section 113(a) of the Dodd-Frank Act (12 U.S.C 5323(a)), a massive and comprehensive legislative effort aimed at preventing a recurrence of the 2007-2009 collapse and breakdown of the

U.S. financial system.

Section 113(a)(1) of the Dodd-Frank Act authorized FSOC to determine that "a U.S. nonbank financial company shall be supervised by the Board of Governors and shall be subject to prudential standards" established by the Federal Reserve Board. The statute provided that this designation could be made if FSOC determines that material financial distress at the U.S. non-bank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the US nonbank financial company, could pose a threat to the financial stability of the United States. In making this designation determination, Section 113(a)(2) provided that FSOC is required to consider ten specific factors, plus a catchall for "any other risk-related factors that the Council deems appropriate", that would justify making the designation determination. These provisions of the Dodd-Frank Act were implemented in regulations (12 C.F.R. § 1310) adopted after notice and comment and in guidance appended to the regulations (12 C.F.R. pt. 1310, App. A).

The District Court's decision rests on three grounds. First, the court held that FSOC was required to assess the likelihood of MetLife's distress before determining whether its distress could threaten financial stability. Second, the court held that FSOC was obligated to project estimated losses of counterparties and other market participants in the event of MetLife's distress. Third, the court held

that FSOC was required to conduct a cost-benefit analysis, taking into account the costs of enhanced prudential standards on MetLife. Strikingly, not a single one of these purported requirements is enshrined in the Dodd-Frank Act, or anywhere else in statute; each is inconsistent with FSOC's interpretations of its own rules and guidance; and each defies the compelling logic behind the designation process contemplated by Congress when it established FSOC.

We are concerned about the implications of the District Court decision with respect to the designation of MetLife by FSOC as subject to Federal Reserve oversight now before this Court on appeal by FSOC. That designation, as with two other very large insurance companies, is clearly intended to carry out an important provision of the Dodd-Frank Act to more effectively anticipate and forestall a serious financial crisis.

There can be no question that MetLife, by its size, by its range of financial activities, and by its intertwined relationships with other parts of the nation's financial system could, under stress, affect the stability of financial markets more generally. The intent of the law is clear: that in view of such potential, FSOC could reasonably conclude that MetLife, like the other very large financial institutions with similar risks, should be brought under the purview of federal financial regulation.

ARGUMENT

A Determination That A Company Is Likely To Experience Financial Distress Should Not Be A Prerequisite To An FSOC Designation Decision

FSOC designation in itself does not, and should not, indicate that those designated insurance companies are currently in financial distress or a present threat to financial stability. Rather the point is, by establishing a degree of supervisory oversight, to provide protection against future policies or changing circumstances that would cause or contribute to institutional distress and amplify a market crisis. To await a designation until an institution is likely to suffer material financial distress, as the District Court seems to imply, would be contrary to the basic purposes for which the FSOC process was created – to avoid financial excesses that could in fact lead to or aggravate a financial crisis.

Experience has amply demonstrated that financial crises can arise suddenly, without clear warning. Even the largest and seemingly well-managed institutions can be vulnerable, facing unexpected large losses and threats to solvency. All of that was demonstrated with great clarity in the 2007-2009 crisis period. Vast amounts of federal assistance were required to restore a degree of stability. Interestingly, MetLife itself, buffeted by the turmoil, found it appropriate to draw upon emergency funds by recourse to special Federal Reserve funding and FDIC guaranty programs (Final Determination pp. 14-15).

As A Prerequisite To A Designation Decision, FSOC Should Not Have To Precisely Quantify The Adverse Effects Of Material Financial Distress

The effect of designation is simply to provide Federal regulatory authorities – in this case the Federal Reserve – with the ability to better assess and protect against future events that cannot be forecast with any certainty with regard to timing or extent. What we do know is that financial instability in fact can and will spread among large, heavily interconnected financial institutions thought to be in relatively strong positions. The repercussions on economic activity, on employment, and on international as well as domestic markets can be devastating. Given this knowledge drawn from experience, it should not be necessary, as a prerequisite to a designation decision, as required by the District Court, for FSOC to quantify precisely the adverse financial consequences for affected market participants.

A Cost/Benefit Analysis Should Not Be Required For FSOC To Make A Designation Decision

We also know that, as for banks and other federally supervised institutions, oversight and regulation may have operational costs and inhibit financial activity that carries risk. But the Dodd-Frank Act does not, and reasonably cannot, call for a cost/benefit analysis with respect to designation. That is the practice with respect to other financial supervisory and regulatory responsibilities. The accepted approach, based upon experience over the years, is that the adverse implications of

a financial crisis for the American economy far outweighs the costs of regulation, tangible and intangible, of reasonably focused regulation and supervision.

The Compelling Logic of the FSOC Designation Process

In sum, it is unfortunate that the District Count ruling fails to recognize the compelling logic of the FSOC designation process – characterized by detailed statutory decision making criteria, by a broad grant of authority to FSOC to make decisions based on such criteria, by notice and comment public rulemaking for making designation decisions carefully circumscribed by dependence on agreement among nine existing federal regulatory agencies, and by consistent application of the foregoing authority in its three other designation decisions--American International Group, Inc., GE Capital Corporation, Inc. and Prudential Financial, Inc.

The District Court's decision frustrates the intention of Congress to establish through FSOC a specific framework for ensuring financial stability, monitoring potential threats to the financial system, and providing for more stringent regulation of nonbank financial companies and financial activities that FSOC determines, based on consideration of risk-related factors, pose risks to financial stability. (Joint Explanatory Statement of the Committee of Conference, p.865.) MetLife is clearly such an interconnected company that could, if it experienced financial distress, have a destabilizing effect on U.S. financial market stability. To

accept the limitation on FSOC's authority inherent in the District Court's rescission decision would in practice undermine both the letter of the relevant authorizing documents and the intent of the designation process embodied in the law.

The result is the substitution of the District Court's judgment for that of the U.S. financial regulatory agency heads specifically designated by Congress to make such judgments, and the imposition of novel requirements on FSOC that Congress never enacted. A major consequence is that one of the world's largest, most highly interconnected financial institutions, is left with inadequate oversight, and FSOC's central mission of identifying and addressing future threats to financial stability is substantially undermined.

CONCLUSION

Amici respectfully submit the foregoing analysis and argument for the consideration of the Court. To accept the limitation on its authority inherent in the District Court rescission decision would in practice undermine both the letter of the relevant authorizing documents and the intent of the designation process embodied in the law.

Respectfully submitted,

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June 23, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and D.C. Circuit Rule 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitations. This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1), this brief contains 2753 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Office Word 2013) used to prepare this brief.

/s/ Michael Bradfield
Michael Bradfield

June 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of June 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Michael Bradfield
Michael Bradfield