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. 15-cv-45 (RMC)

BRIEF *AMICUS CURIAE* OF BETTER MARKETS, INC. IN OPPOSITION TO METLIFE'S MOTION TO HOLD APPEAL IN ABEYANCE

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CORPORATE DISCLOSURE STATEMENT

Better Markets, Inc. ("Better Markets") is an independent, nonpartisan, non-profit organization that promotes the public interest in the financial markets. Better Markets states that it has no parent corporation and that there is no publicly held corporation that owns any stock in Better Markets.

REPRESENTATION REGARDING CONSENT

Better Markets represents that it contacted counsel for all parties to seek their consent. Counsel for MetLife declined to give consent, and counsel for the Department of Justice was not able to convey its position to Better Markets as of the time of filing.

STATEMENT REGARDING AUTHORSHIP AND FUNDING

Better Markets states that no counsel for a party authored this brief in whole or in part, and no person other than Better Markets or its counsel made a monetary contribution to fund its preparation or submission.

STATEMENT REGARDING RELATED CASE

Better Markets is the intervenor/appellant in Case No. 16-5188, *MetLife v. Fin. Stability Oversight Counsel*. Better Markets is appealing the district court's decision granting Better Markets' motion to intervene but denying its motion for an order to show cause why portions of the record should not be unsealed. *See MetLife,*

*Inc. v. Fin. Stability Oversight Council, No. CV 15-0045 (RMC), 2016 WL 3024015, at *1 (D.D.C. May 25, 2016)*.

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INTRODUCTION

At the eleventh hour, after full briefings and oral argument over six months ago, a party to this legal proceeding, MetLife, is attempting to use an entirely separate, highly contingent, and speculative political process orchestrated by nonparties to forestall a decision by this Court on the merits of this case. These apparently coordinated political and legal maneuvers, however, fail to meet the requirements necessary to hold this case in abeyance.

Moreover, granting MetLife's Motion would result in an extensive delay and a consequent harm to the public interest. Such an extraordinary action would leave in place an erroneous District Court decision that is doubly damaging. First, that decision continues to expose the American people to the risks arising from MetLife itself, which in the judgment of 9 out of 10 of FSOC's voting members poses a threat to the financial stability of the United States and warrants enhanced supervision. Second, the district court's decision continues to limit the FSOC's authority and ability to designate other systemically dangerous nonbanks to help prevent another financial crisis.

FSOC is the only entity in the United States government with the power and authority to identify, analyze, and designate for heightened regulation systemically dangerous nonbank financial entities. **FSOC has fifteen members, ten of which have voting authority, and it is comprised of the leaders of all the U.S.**

financial regulatory agencies. It was one of the most important financial reforms enacted in the wake of the 2008 financial crash and economic catastrophe, which grievously harmed tens of millions of Americans and will ultimately cost the U.S. more than $20 trillion in lost GDP.

None of those facts were mentioned in the Motion or FSOC's response. FSOC's statutory powers, authorities, and responsibilities were not granted to the Treasury Department, the Treasury Secretary, the President, "the government," or "the Administration," all persons or entities the Motion suggests control FSOC. The Motion discusses these persons and entities as if they are virtually synonymous with FSOC, but that is inconsistent with the letter, spirit, and intent of the statutory provisions creating and governing FSOC. As pointed out below, equally troubling, counsel for FSOC also failed to point any of this out to the Court.

MetLife's challenge to this critically important designation authority should be resolved by this Court as soon as possible, not further delayed.

IDENTITY AND INTEREST OF BETTER MARKETS

Better Markets, Inc. ("Better Markets") is an independent, nonpartisan, nonprofit organization that promotes the public interest in the financial markets. It was founded in the wake of the 2008 crash—the worst financial crash since the Great Depression—to support the reform of our financial regulatory framework so that systemically dangerous financial firms, banks and nonbanks alike, would never

again bring our economy to the brink of collapse. Focusing extensively on the rule-makings required by the Dodd-Frank Act, Better Markets has participated in more than 200 rulemakings and filed more than 200 comment letters to the FSOC, CFTC, SEC, Federal Reserve, and other financial regulators, advocating for swift and strong implementation of reforms in the securities, commodities, and lending markets. This advocacy promotes transparency, accountability, and oversight in the financial markets so that they remain sufficiently strong and stable to serve the real economy without precipitating another crisis.

Better Markets has a strong interest in defending financial reform, and more specifically, it has been a leading advocate for promoting and protecting the FSOC and its authority. Better Markets filed an amicus brief in support of the FSOC in this appeal, and in the district court below. *See, e.g.*, Brief of *Amicus Curiae* of Better Markets, Inc. in Support of the Defendant-Appellant, No. 16-5086 (D.C. Cir. filed June 23, 2016). Better Markets has exhaustively studied the enormous costs of the 2008 crisis, which destroyed tens of millions of jobs, triggered a tidal wave of home foreclosures, caused untold human suffering, and obliterated at least $20 trillion in gross domestic product. *See* BETTER MARKETS, THE COST OF THE CRISIS: $20 TRILLION AND COUNTING (2015), *available at* www.bettermarkets.com/costofthecrisis. Better Markets has also highlighted the critical role of the FSOC's designation au-

thority in preventing a recurrence of that financial and economic disaster. For example, Better Markets accepted the Senate Banking Committee's invitation to testify about the importance of the FSOC's designation authority to preventing financial crises.[1] Better Markets has repeatedly highlighted the need to shield the American economy from unreasonable risks posed by the largest, most complex, highly leveraged, and extensively interconnected nonbank financial institutions.[2] Another interest of Better Markets in this appeal concerns the obligations of regulatory agencies under their organic statutes and under the Administrative Procedure Act, which Better Markets regularly analyzes, having defended rules of the SEC and CFTC multiple times in court. Many of those submissions focused on the scope of an agency's obligation to conduct economic analysis, a theme of MetLife's arguments on the merits in this case.[3]

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[1] *See FSOC Accountability: Nonbank Designations: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 114th Cong. (2015) (statement of Dennis M. Kelleher, President and CEO, Better Markets), *available at* http://www.bettermarkets.com/sites/default/files/documents/Kelleher%20Testimony%203-25-15_1.pdf.

[2] *See* Comment Letters from Better Markets to the FSOC on Authority to Designate Financial Markets Utilities as Systemically Important (Jan. 20, 2011 and May 27, 2011); Comment Letter from Better Markets to the FSOC on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies (Dec. 19, 2011), collected comment letters *available at* http://www.bettermarkets.com/sites/default/files/FSOC_Comment_Letters.pdf.

[3] *See, e.g.*, *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 369–70 (D.C. Cir. 2014) (reflecting Better Markets' arguments in upholding the SEC's economic analysis of its

MetLife's motion to hold this appeal in abeyance undermines Better Markets' interests. If granted, a stay will delay the resolution of this case for a significant period of time, potentially indefinitely. Allowing the lower court decision to remain intact and uncorrected threatens several harms. First, MetLife, one of the largest, most complex, and most interconnected financial firms in the U.S., will remain free of federal prudential regulation, contrary to the judgment of the nation's leading regulatory authorities, as set forth in their 341-page final determination. Second, if left intact, the district court's decision will also critically impair the FSOC's ability to exercise its designation authority in the future, as the decision erects hurdles that make the FSOC's already daunting task nearly impossible. Finally, and even more broadly, the decision threatens to impose unjustifiable burdens on all agencies: If every statute with the word "appropriate" now requires its administering agency to conduct cost-benefit analysis before acting, the entire process of regulating our financial markets will suffer major setbacks, slowing the rulemaking process and making every rule an easier target for litigation challenge.

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disclosure rule on conflict minerals), *overruled on other grounds by Am. Meat Inst. v. USDA*, 760 F.3d 18 (D.C. Cir. 2014) (en banc); *ICI v. CFTC*, 720 F.3d 370, 377–80 (D.C. Cir. 2013) (reflecting Better Markets' arguments in upholding the CFTC's economic analysis of its registration rule for commodity-pool operators); *see also Sec. Indus. & Fin. Mkts. Ass'n v. CFTC*, 67 F. Supp. 3d 373, 387 (D.D.C. 2014) (citing Better Markets' description of the bailout funds channeled through AIG to its counterparties).

BACKGROUND

In the aftermath of the worst financial and economic crisis since the Great Depression, Congress passed the Dodd-Frank Act, and as part of those reforms, created the FSOC. Comprised of the heads of all the major federal and state financial regulators, *see* 12 U.S.C. Sec. 5321, **the FSOC alone was given the unique responsibility and authority** to identify systemic risks to the financial stability of the United States and, when a carefully defined set of statutory criteria are met, to address those risks by designating non-bank financial institutions for prudential supervision by the Federal Reserve. No other entity in the U.S. government has that duty regarding systemically dangerous nonbanks or the authority to carry it out.

In this case, after an exhaustive 17-month information-gathering and evaluative process, FSOC determined that material financial distress at MetLife could pose a threat to the financial stability of the United States and that MetLife should be supervised by the Board of Governors of the Federal Reserve and subject to prudential standards.

On January 13, 2015, MetLife filed suit in the United States District Court for the District of Columbia, challenging its designation, based upon the administrative record that the FSOC had compiled. While the District Court rejected or declined to address many of MetLife's claim, *MetLife, Inc. v. Fin. Stability Oversight Counsel*, 177 F. Supp. 3d 219, 223, 230, 242 (D.D.C. 2016), it nevertheless held that the

designation was arbitrary and capricious for several reasons, and it rescinded the designation, *id.* at 242. This appeal by the FSOC ensued.

On April 21, 2017, while this **legal** proceeding was pending, President Trump initiated a **political** process by issuing a memorandum directing his political appointee, the Secretary of the Department of the Treasury, to "conduct a thorough review of the FSOC's determination and designation processes under Section 113 . . . . of the Dodd-Frank Act," and to provide a written report to him within 180 days. *See* Presidential Memorandum for the Secretary of the Treasury, 2017 WL 142320 (Apr. 21, 2017) ("Memorandum"), at Section 1. While the Memorandum never expressly references MetLife, the factors listed by the President in the Memorandum to be considered in the Treasury Department's initial 180-day review process bear a striking similarity to the holdings in the district court opinion as well as the arguments that MetLife advanced in its briefs.

MetLife filed its Motion to hold this appeal in abeyance immediately after the President issued his Memorandum—the very next business day, in fact—arguing that the case should be stayed since the forthcoming report, six months in the offing, might prompt a change in the Administration's posture in the case, or at least "illuminate" the Court's consideration of the issues presented. Mot. to Hold Appeal in Abeyance at 1, *MetLife, Inc. v. Fin. Stability Oversight Counsel*, 177 F. Supp. 3d 219 (D.D.C. 2016) (No. 16-5086) ("Motion").

On May 4, 2017, the FSOC filed its response to MetLife's Motion. Response to Mot. to Hold Appeal in Abeyance, *MetLife, Inc. v. Fin. Stability Oversight Counsel*, 177 F. Supp. 3d 219 (D.D.C. 2016) (No. 16-5086) ("Response"). It stated that it was not taking a position on the Motion per se, but instead consented to a 60-day abeyance, fully one-third of the total delay requested in the Motion, to afford additional time for it to deliberate on the Motion. Response at 1. It further sought approval to submit a "status report" at the conclusion of the 60-day stay. Response at 1 – 2.

Glossed over in MetLife's Motion are the fundamental distinctions between the political and legal processes now in play, and the various actors involved in each. The Treasury Department is a distinct and separate entity from the FSOC, which has its own identity, organic statute, composition, mission, and procedures. Moreover, the Treasury Department is not a party to this legal action; rather, the FSOC is the governmental entity whose designation decision is being challenged.

Further, the President's newly initiated political process is legally unrelated to this ongoing proceeding between the two parties, FSOC and MetLife. And as detailed below, even though the subject matter of the initial 180-day political process overlaps to some extent with the issues raised in this legal proceeding, the political process will have no direct, certain, or imminent impact on any of the issues raised in the legal proceeding.

Accordingly, as argued more fully below, and for two distinct reasons, the political process should **not** be used to suspend a vitally important legal proceeding between different parties. MetLife's Motion should be denied outright, and this case should be decided on the merits, notwithstanding the FSOC's willingness to agree to a more limited 60-day abeyance period.[4]

SUMMARY OF ARGUMENT

First, the outcome of the political review process ordered by President Trump is highly uncertain. And even if the report recommends changes to FSOC's designation process, whether, when, and how those recommendations are even considered, much less adopted, by FSOC is also highly uncertain. The report due in 180 days will have no power by itself to alter the designation process or the resolution of this case. Neither the President, the Treasury Secretary, nor the report itself can

[4] Nowhere in its response to the Motion did the Department of Justice ("DOJ") point out to this Court that the political process MetLife seeks to use to delay this legal proceeding does not involve the parties to this proceeding, is highly contingent and speculative, and will not determine the factual and legal issues in this case. The DOJ's multiple roles—representing the President and the Treasury Department, actors in the political process, as well as the FSOC, a party to this legal proceeding—casts doubt on whether the FSOC is receiving independent, unconflicted legal representation. Put differently, it appears highly likely that independent, unconflicted legal representation for FSOC would have staunchly opposed MetLife's Motion for a stay and brought before this court the facts and issues that this amicus brief is raising. In light of this, we respectfully suggest that the Court may wish to consider, sua sponte, whether the DOJ should be disqualified from representing the FSOC in this matter.

change the record on which the FSOC based its decision to designate MetLife, the record on which the district court based its decision to vacate the designation, the law that the district court applied, or even the posture that the FSOC maintains in this appeal, as neither the Treasury Secretary nor the President are parties to this case. To alter its stance in this appeal, or to change its rules or guidance relating to the designation process, the FSOC's ten voting members, acting as a separate and distinct entity created by law, would have to take affirmative action in accordance with its charter and procedures.

Second, holding the case in abeyance would materially harm the public interest, as it would delay the resolution of one of the most important cases confronting any court in the modern era of financial regulation, potentially extending indefinitely the public's exposure to the systemic risks posed by MetLife and prolonging the crippling effects of the lower court's decision on the ability of the FSOC to exercise its designation authority when necessary now or in the future.

ARGUMENT

I. THE MOTION SHOULD BE DENIED BECAUSE (1) THE POLITICAL PROCESS AND RESULTING REPORT CAN HAVE NO DIRECT, SIGNIFICANT IMPACT ON THE RESOLUTION OF THIS CASE, AND (2) THE PUBLIC INTEREST WOULD SUFFER IF THE MOTION WERE GRANTED.

The Court has broad discretion in deciding whether to grant or deny a motion to hold a case in abeyance. The Court may weigh a number of factors, including the

"pendency" of other proceedings that may affect the outcome of the case, as well as the "traditional factors" required for granting a stay, *Basardh v. Gates,* 545 F.3d 1068, 1069 (D.C. Cir. 2008), which includes the public interest. The proponent of a stay bears the burden of establishing its need. *See Clinton v. Jones*, 520 U.S. 681, 708 (1997) (stay of trial in case against President held to be an abuse of discretion).

With respect to other proceedings or developments, abeyances are not appropriate merely because a new administration is in place or seeks to review agency policies. Instead, as the cases cited by MetLife show, the abeyance is more narrowly granted where an administration's actions would have a direct effect on the case at bar, by for example, rendering it moot. For instance, in *American Petroleum Institute v. EPA*, 683 F.3d 382 (D.C. Cir. 2012) the EPA was a party to the case and had actually issued a notice of proposed rulemaking, which if adopted, would have rendered the court case moot or substantially altered the legal issues presented. *Id* at 387. In *United States House of Representatives v. Price*, NO 16-5202 (D.C. Cir. Dec. 5, 2016) the election of a new administration meant that the actual parties to the case, the Treasury Secretary and the Secretary of Health and Human Services, would soon be new political appointees who would have the direct authority to change the handling of the case.

And even the pendency of a new rulemaking would not be dispositive: "All of this is not to say an agency can stave off judicial review of a challenged rule

simply by initiating a new proposed rulemaking that would amend the rule in a significant way. If that were true, a savvy agency could perpetually dodge review." *American Petroleum*, 683 F. 3d at 388. Even more so, a savvy litigant cannot stave off judicial review through the hazy prospect of a lengthy policy review, conducted by non-parties, with an entirely uncertain outcome. Moreover, granting the abeyance would harm the public interest.

A. The political review process and anticipated report provide no justification for delaying this legal proceeding.

A strategy underlying the Presidential Memo is not hard to discern. The review ordered by President Trump appears designed to generate a report with findings that would neatly correspond to the contested issues in this case. The anticipated report could then be invoked prospectively by MetLife as the basis for short circuiting this appeal. MetLife did precisely that, by immediately filing its motion for an abeyance on the heels of the President's Memorandum.

The parallels between the factors set forth in the President's Memorandum and the district court's three core holdings are unmistakable:

- First, the district court held that FSOC failed to assess the likelihood that MetLife would experience material financial distress, 177 F. Supp. 3d at 233-36. Similarly, the Memorandum requires Treasury to con-

sider "whether evaluation of a nonbank financial company's vulnerability to material financial distress . . . . should assess the likelihood of such distress," Memorandum, Section 1, para. (c);

- Second, the district court held that in determining whether MetLife's distress could pose a threat to the financial stability of the United States, the FSOC failed to project the actual losses that would arise in the event of such distress, 177 F. Supp. 3d at 237-39. Similarly, the Memorandum requires the Treasury Secretary to consider "whether any determination as to whether a nonbank financial company's material financial distress could threaten the financial stability of the United States . . . should include specific, quantifiable projections of the damage that could be caused to the United States economy, including a specific quantification of losses that would be likely . . . . ," Memorandum, Section 1, para. (e).
- Third, the district court held that FSOC failed to consider the costs of designation to MetLife, 177 F. Supp. 3d at 239-42. Similarly, the Memorandum requires the Treasury Secretary to consider "whether these processes adequately consider the costs of any determination or designation on the regulated entity," Memorandum, Section 1, para. (f).

While the Treasury Department's musing and conclusions on these topics in 180 days may be interesting, they will bear no direct relationship to the FSOC, its designation procedures, or this legal proceeding. Yet, the mere prospect of the resulting report, some six months down the road, is now being invoked as a pretext for substantially delaying this judicial proceeding. MetLife's argument in essence is that the report *may* prompt the Administration to re-evaluate FSOC's positions on the very issues presented in this case or *may* influence this Court's disposition of the issues presented. But, for a variety of reasons, this choreographed political review process, with its highly speculative outcome, cannot impact this case and cannot justify holding this case in abeyance.

First, the process would entail putting this case on hold for half a year at a minimum and possibly longer if the review process is extended, all for an outcome that is—or at least should be—highly uncertain (i.e., unless all these complex, key issues have been pre-determined). Indeed, given the provisions of the Dodd-Frank Act that control the designation process, and the thoughtful and thorough process that the FSOC applied when it formulated its rules and guidance, it would appear unlikely that the review process will arrive at conclusions materially at odds with the approach FSOC has taken to date in its designations.

Second, even if the Treasury Secretary's review concludes that FSOC should alter its approach to designation, the resulting impact on FSOC and the designation

process is also highly uncertain. The President's request to a political appointee at the Treasury Department for report on the FSOC's designation process in 180 days has no formal or official connection to the FSOC whatsoever. The FSOC is not the Treasury Department and the Treasury Department is not a party to MetLife's law-suit. The FSOC is a separate legal entity that must itself act in accordance with the law—which is precisely what the FSOC did when it designated MetLife, the action MetLife is now challenging in this case.

The FSOC will have to make its own decisions about what to do with any findings in the report, assuming that the report is properly put before the FSOC for consideration, and that itself entails a complicated, lengthy process.[5] The report would only alter FSOC's approach to designation if a majority or supermajority of the ten voting members of FSOC felt changes were warranted. And any such changes would have to be the subject of a lawful regulatory process in accordance with the APA. An agency such as the FSOC simply cannot change or reverse its rules on a whim, a political directive, or without a good reason and according to the governing laws; if it does, it will be overturned in court as arbitrary and capricious.

[5] FSOC's Response to the Motion reflects this very point. In that Response, FSOC states that it will require at least 60 days, and possibly more, for FSOC just to deliberate about the Motion. *See* Response. This not only portends an even longer delay, it also confirms that the handling of this case, at this juncture and in the future, will be determined by FSOC acting through its members, who must deliberate, not simply by virtue of the findings of any review or report.

Instead, it must follow a series of steps under the law, including notice and comment rulemaking, designed to ensure that there is appropriate public input and that the public interest is protected.

Finally, even if the report recommends changes to the designation process going forward, and even if the FSOC is persuaded to make them in whole or in part through a rulemaking process, none of that would alter the essential legal issues pending before this Court or the need for the Court to address them. New designation rules could not re-write the plain language of the Dodd-Frank Act applicable in this case, alter the record on which the FSOC acted in this case, or cure the errors in the district court's decision. This Court must resolve those questions, regardless of what a politically motivated, distant, and uncertain report might contain.

At best, the President's Memorandum sets in motion a complex, multi-step, multi-year process with numerous critical decision points, all of which are highly uncertain and all of which argue against granting MetLife's request for a stay of any duration. None of the type of dispositive impacts envisioned in abeyance cases are present here.

B. The public interest would suffer if the abeyance were granted.

As noted above, an important factor bearing on MetLife's Motion is the impact that holding the case in abeyance would have on the public interest. In its Mo-

tion, MetLife glosses over this consideration, offering a cursory argument that ignores the true public interest at stake and even raises serious separation of powers concerns.

For example, MetLife asserts that "neither the parties nor the public will be prejudiced by a decision to hold this appeal in abeyance, which would simply preserve the status quo. . . ." Motion at 8. But holding this case in limbo by preserving the status quo is precisely what poses a serious threat to the public interest. The status quo is a still-intact, deeply flawed district court opinion that rescinded a designation, thereby removing an important layer of protection helping to shield the public from another financial crisis.

Moreover, MetLife's claim that "issuing an opinion during the ongoing review . . . would deny the new Administration the opportunity to ensure that the government's positions in this litigation are consistent with the findings of the Treasury Secretary's forthcoming report" is misleading. It is in effect claiming that FSOC, the party in this case and an independent entity with specific statutory duties, is somehow the same as "the new Administration" or "the government," both nonparties.[6] FSOC is required by law to discharge its duties, not to subordinate them to the

[6] The failure of FSOC's counsel to forcefully object to this attempted merger of "the Administration," "the government," and FSOC, as well as MetLife's argument that the litigation should be "harmonized," again clearly suggests the FSOC is not receiving independent unconflicted legal advice solely in the best interests of FSOC. *See* n. 4 above.

new Administration or harmonize them with the forthcoming report, generated by an unrelated party.[7]

Moreover, as explained above, this argument erroneously assumes that the review and report will **conflict** with FSOC's posture in this case. And in any event, the Administration's quest for harmony is vastly outweighed by the much more important interest that millions of Americans have in avoiding another financial crisis through the efforts of FSOC.

Finally, MetLife cautions that an opinion reversing the lower court and reinstating MetLife's designation would "directly undermine the President's clear instruction to the Treasury Secretary that there should be a '[p]ause of [d]eterminations and [d]esignations' until the Secretary has issued his report examining the designation process." *Id.* This argument is wide of the mark. The Presidential Memorandum does not purport to limit the authority of this or any other court; to the contrary, it expressly preserves "applicable law." Memorandum, Section 4, para. (b); *see also id.* at Section 3 (providing that the Secretary shall, "to the extent consistent with

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[7] The Treasury Secretary may be the Chairman of FSOC, but he is only one of ten votes on FSOC, which requires a majority or supermajority of FSOC's 10 voting members as determined by statue to act. Moreover, the President is not member of FSOC, nor is "the Administration" or "the government," which is constituted by separate legal entities governed by different statutes. That, presumably, is why the President didn't issue his Memorandum to the FSOC itself and why he didn't order FSOC to rescind the designation of MetLife or simply order FSOC to drop this litigation, which is, de facto, what MetLife seeks to accomplish here.

law," not vote for non-emergency designations). In any event, a decision from this Court reinstating FSOC's earlier designation of MetLife clearly would not violate the instructions to the Treasury Secretary set forth in the Memorandum.

The American public, which suffered so gravely from the financial crisis that identified the vital need for the FSOC, deserves to have the appellate court finish the legal proceeding that MetLife started. This lawsuit should not be stayed because MetLife now has a political ally in the White House and is looking for a political shortcut to evade the legal process, leaving in place a deeply flawed District Court decision. The Motion is little more than an attempt to substitute a political forum for a legal forum, subordinating this Court's proper role to the political process.

CONCLUSION

For the foregoing reasons, the Motion to hold this case in abeyance should be denied.

Respectfully submitted,

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Dated: May 8, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 4604 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this *amicus* brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, with 14-point Times New Roman font.

Executed this 8th day of May, 2017.

/s/ Dennis M. Kelleher
Dennis M. Kelleher

Counsel for Better Markets

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed 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 on May 8, 2017.

I hereby further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: May 8, 2017

/s/ Dennis M. Kelleher
Dennis M. Kelleher

Counsel for Better Markets