Oral Argument Held October 24, 2016
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 IN SUPPORT OF DEFENDANT-APPELLANT, ARGUING FOR DISQUALIFICATION OF THE DEPARTMENT OF JUSTICE AS COUNSEL FOR DEFENDANT-APPELLANT, APPOINTMENT OF INDEPENDENT COUNSEL OR *AMICUS CURIAE*, AND DENIAL OF ANY FUTHER ABEYANCE

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CORPORATE DISCLOSURE STATEMENT

Better Markets, Inc. ("Better Markets") is an independent, non-partisan, 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, Inc. did not consent, and counsel for the Financial Stability Oversight Council had not responded as of the time Better Markets filed its motion and this proposed brief.

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 Council*. 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

Better Markets, Inc. ("Better Markets") respectfully submits this brief as *amicus curiae*, urging this Court to (1) find that the Department of Justice's ("DOJ's") representation of the Financial Stability Oversight Council ("FSOC") in this case, and its simultaneous representation of the President of the United States and the Secretary of the Treasury in their effort to undermine this case, create an impermissible conflict of interest; (2) disqualify the DOJ as counsel for FSOC; (3) appoint independent counsel or *amicus curiae* to represent FSOC and to defend its designation of MetLife, Inc. ("MetLife") for supervision by the Federal Reserve Board; and (4) deny MetLife's renewed motion for an abeyance as well as the DOJ's motion, filed on behalf of FSOC, seeking a 30-day abeyance.

The DOJ's representation of FSOC in this case has given rise to a clear and unmanageable conflict of interest. On the one hand, the DOJ is counsel to FSOC in this appeal, as the agency seeks to overturn an erroneous district court decision invalidating FSOC's designation of MetLife as a potential threat to the financial stability of the United States. Yet at the same time, the DOJ is counsel to the President and the Treasury Secretary who, in apparent coordination with MetLife, have launched a review of FSOC's designation process clearly designed to delay and ultimately derail this appeal. These dual roles create an intolerable conflict of interest warranting disqualification of the DOJ as counsel for FSOC.

This conflict is already taking a toll on FSOC, hampering the expeditious resolution of this case and undermining FSOC's best interest. First, the DOJ, in its role as counsel for FSOC, largely capitulated to MetLife's initial attempt to obtain a lengthy stay of this case and to forestall a resolution on the merits. *See* Res. to Mot. to Hold Case in Abeyance (May 5, 2017) (agreeing to a 60-day stay). More recently, on July 11, 2017, the DOJ actually moved on behalf of FSOC to hold the case in abeyance for an additional 30 days, ostensibly to evaluate MetLife's motion for a lengthy delay. And the DOJ has filed its two responses to MetLife's motion without advancing the obvious grounds for opposing MetLife's request: The Administration's review of the designation process, pursuant to the President's April 21, 2017 memorandum, *see* Presidential Memorandum for the Secretary of the Treasury, 2017 WL 142320 (Apr. 21, 2017) ("Memorandum"), provides no valid legal, logical, or policy basis for any delay of this case. The result has been a 60-day period of abeyance, with potentially another 30 days in the offing, for no legitimate reason.

This delay tactic runs directly counter to the best interests of FSOC, whose designation authority remains largely disabled by virtue of the district court's opinion. It also runs directly counter to the public interest, which depends upon the unfettered exercise of FSOC's unique oversight and designation authority to help prevent another devastating financial crisis like the one that swept over the nation in 2008. And the district court's decision continues to create a dangerous safe haven

for MetLife, allowing it to evade designation contrary to FSOC's thoroughly considered judgment that it poses a threat to the financial stability of the United States.

In short, the financial industry and the Administration are using the political process to corrupt the legal process by delaying and potentially terminating this appeal on the eve of a pivotal decision on the merits. The DOJ is an instrumentality of this strategy, as evidenced by its willingness to acquiesce in repeated delays of this appeal and by its role as adviser to the President in preparing the Memorandum. And, the DOJ's conflicted posture threatens to further undermine FSOC's interest as this case progresses. The DOJ's divided loyalties to FSOC on the one hand and to the President and the Treasury Secretary on the other place it in an untenable position.[1]

Since DOJ's conflict is institutional and not specific to any individual attorneys, the appropriate remedy is the disqualification of the entire DOJ as counsel for FSOC in this case. At a minimum, it is appropriate and necessary for the Court to use its broad discretion to appoint an independent counsel, or *amicus curiae*, to argue on behalf of FSOC with unrelenting resolve going forward.

[1] In making these arguments, Better Markets does not intend to impugn the integrity of any DOJ attorney or the DOJ as a whole. Rather, it contends that the DOJ is in fact conflicted, and that while it may be attempting to manage that conflict as well as it can, it is impossible for the DOJ to continue its representation of FSOC in this appeal and stay true to the applicable ethical standards.

Finally, because attempts to further delay this case are wholly without merit, principally for the reasons Better Markets set forth in its previously filed opposition, the Court should deny both of the parties' requests seeking additional abeyance periods.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Better Markets is a non-profit, non-partisan organization that promotes the public interest in the financial markets through comment letters, litigation, independent research, and public advocacy. It fights for reforms that create a stronger, safer financial system; promote the economic prosperity of all Americans; and protect individual investors from fraud, abuse, and conflicts of interest. Better Markets has submitted more than 225 comment letters to financial regulators, including FSOC, advocating for strong implementation of reforms in the securities, commodities, and credit markets. It has also filed numerous *amicus* briefs in federal district and circuit courts defending agency rules and actions on legal and policy grounds, including an *amicus* brief on the merits in this appeal as well as an *amicus* brief in the district court proceeding. *See* Brief *Amicus Curiae* of Better Markets, Inc. in Support of the Def.-Appellant (June 23, 2016); Brief *Amicus Curiae* of Better Markets, Inc., in Support of Financial Stability Oversight Council, *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F.Supp.3d 219 (D.D.C. 2016); *see generally* Better Markets' website, http://www.bettermarkets.com (including archive of comment letters and briefs).

Better Markets has a strong interest in the outcome of this appeal because unless the district court's ruling is overturned, MetLife will pose a continued threat to the financial stability of the United States, FSOC's unique and critically important designation authority will be severely weakened, the principles governing deference to administrative agency interpretations of the law and their own guidance will be eroded, and the scope of an agency's duty to conduct cost-benefit analysis will be stretched far beyond what Congress intends, all to the detriment of the public interest.

More information about Better Markets and its interest in this appeal is set forth in the motion seeking leave to file this brief, submitted herewith. The Court's disposition of that motion is the source of Better Markets' authority to file this brief.

FACTUAL 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 FSOC. Comprised of the heads of all the major federal and state financial regulators, *see* 12 U.S.C. § 5321 (2012), 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. 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.

On December 18, 2014, 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 Federal Reserve.

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 FSOC had compiled. While the district court rejected or declined to address many of MetLife's claim, *MetLife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 223, 230, 242 (D.D.C. 2016), it nevertheless held that the designation was arbitrary and capricious for three reasons, and it rescinded the designation, *id.* at 242.

On April 20, 2016, FSOC appealed to this Court. Briefing on the merits was concluded on September 9, 2016 and oral argument was heard on October 24, 2016. In the briefing phase and at oral argument, the DOJ vigorously represented FSOC, urging reversal of the district court on all three grounds upon which the court had

vacated the designation. The case is poised for a decision by the merits panel at any time.

However, at the eleventh hour, on April 21, 2017, while this legal proceeding was pending, President Trump initiated a political process by issuing the Memorandum directing his political appointee, the Secretary of the Department of the Treasury, to "conduct a thorough review of 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* 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 at the center of this appeal as well as the arguments that MetLife advanced in its briefs.

The circumstances surrounding the Memorandum powerfully reinforce the inference that it was designed for the purpose of fending off a potentially adverse ruling from this Court. It appears that the Memorandum may well have been prepared with the assistance of a former MetLife lobbyist (Andrew Olmem), who became a special assistant to the President for financial policy in February 2017, just two months before issuance of the Memorandum and following the waiver of the normally applicable ethics rules. *See* David Dayen, *Trump Just Set His Lobbying Rules On Fire*, The Nation (Jun. 1, 2017), https://www.thenation.com/article/trump-just-

set-lobbying-rules-fire/;/; *see also* Press Release, Office of the Press Secretary, White House National Economic Council Director Announces Senior Staff Appointments (Feb. 27, 2017), https://www.whitehouse.gov/the-press-office/2017/02/27/white-house-national-economic-council-director-announces-senior-staff.

Taking full advantage of the litigation opportunity created by the Memorandum, MetLife filed its Motion to hold this appeal in abeyance immediately after the President issued it—the very next business day, in fact. MetLife argued that the case should be stayed since the forthcoming report, then 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 (Apr. 24, 2017) ("Motion").

On May 4, 2017, the DOJ filed its response to MetLife's Motion on behalf of FSOC. Response to Mot. to Hold Appeal in Abeyance (May 4, 2017) ("Response"). Remarkably, 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.

Nowhere in its Response to the Motion did the DOJ point out to this Court a number of critically important facts weighing strongly against any stay of the case. ***First***, the DOJ failed to point out 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 Treasury Department is a distinct and separate entity from 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, 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. 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.

Second, the DOJ made no mention of the fact that holding the case in abeyance threatens the public interest by leaving in place an erroneous district court decision that is doubly damaging. 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. In addition, the district court's decision continues to limit FSOC's authority and ability to designate other systemically dangerous nonbanks to help prevent another financial crisis.

On May 8, 2017, Better Markets, acting as an *amicus*, filed an opposition to the motion for abeyance. Brief of *Amicus Curiae* Better Markets, Inc. In Opp'n to Metlife's Motion to Hold Appeal in Abeyance (May 8, 2017) (hereinafter "Opposition"). It argued the key points that the DOJ omitted from its response to MetLife's motion: (1) MetLife is improperly attempting to use a separate, political review process, involving non-parties and offering a highly speculative outcome, to forestall a decision on the merits in this appeal; (2) Holding the case in abeyance would harm the public interest by delaying resolution of one of the most important financial reform cases in history. *See generally* Opposition.

In addition, Better Markets raised concerns about DOJ's ability to provide independent representation of FSOC in FSOC's best interest. Better Markets cited to the DOJ's failure to vigorously oppose the motion, its failure to highlight the facts militating against any stay, and its simultaneous representation of the President, the Treasury Secretary, and FSOC. *Id.* at 9 n. 4.

The Court accepted Better Markets' *amicus* brief, over MetLife's strenuous written opposition, but granted a 60-day abeyance, with an order requiring the parties

to file, on or before July 11, 2017, "motions to govern future proceedings." Order of May 12, 2017.

On July 6, 2017, MetLife filed a Renewed Mot. to Hold Appeal in Abeyance Pending the Secretary of the Treasury's Forthcoming Report on FSOC Designation Process (July 6, 2016) ("Renewed Motion for Abeyance"). It repeated essentially the same arguments that MetLife had previously advanced in its initial motion seeking to place this appeal on hold until the review mandated by the President is concluded.

Finally, on July 11, 2017, the DOJ filed a motion on behalf of FSOC not just agreeing to an additional period of abeyance, but affirmatively requesting that the Court "continue to hold the appeal in abeyance for an additional 30 days." *See* Mot. to Hold Case in Abeyance for Thirty Additional Days, at 2 (July 11, 2016). DOJ cited as the basis for the request the need for "Council members to discuss this issue at the upcoming meeting." *Id.*

ARGUMENT

I. The DOJ has a fundamental conflict of interest that prevents it from representing FSOC in this appeal with the wholehearted zeal required of attorneys.

It is a fundamental tenet of American jurisprudence that every attorney, including those in the government, must provide their clients with zealous, wholehearted, and unconflicted legal representation. Adherence to this bedrock principle

can never be more important than in a case such as this, where matters of historic public interest are at stake. Here, the DOJ can no longer comply with this standard because its obligation to press this appeal and seek reversal conflicts with its simultaneous obligation to assist the President in an apparent effort to derail this case.

A. The full range of ethical standards apply to the DOJ and its attorneys.

Multiple statutory provisions, DOJ regulations, and rules of this Court apply the full range of ethical duties and constraints to government attorneys. Congress has made clear that federal government attorneys are subject to "State laws and rules, and local Federal court rules, governing attorneys . . . to the same extent and in the same manner as other attorneys in that State." 18 U.S.C. § 530B(a) (2012).

The DOJ's own rules reflect a clear and strong commitment to the code of ethics, as they require DOJ attorneys to perform "in accordance with the highest ethical standards." 28 C.F.R. § 77.1 (2016). More specifically, the DOJ makes clear that "state laws and rules" applicable to DOJ attorneys include those "that prescribe ethical conduct for attorneys and that would subject an attorney, whether or not a Department attorney, to professional discipline, such as a code of professional responsibility." 28 C.F.R. § 77.2 (2016). And in this context, the term "attorney" encompasses "the Attorney General; the Deputy Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, . . . 28 C.F.R. § 77.2(a).

Finally, this Court's own rules require every attorney who practices before it to follow the rules of professional conduct adopted for the District of Columbia. *See* D.C. Cir. R. App. P. Appendix II R. I(b); *see also* 28 C.F.R. § 77.4(a) (2016) (DOJ regulation mandating that its attorneys submit to the ethical rules of the court in which they practice).

B. The Ethics Rules require zealous representation, free from conflicts of interest.

Rule 1.3 of the District of Columbia Rules of Professional Conduct ("Ethics Rules") impose a clear duty upon lawyers to "represent a client zealously and diligently within the bounds of the law." Ethics Rule 1.3(a). The comments fill in the contours of the duty by providing that the lawyer must "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." *Id.* Further, they provide that "a lawyer should always act in a manner consistent with the best interests of the client." Comment [6] to Ethics Rule 1.3; *see also* Comment [1] to Ethics Rule 3.1 ("The advocate has a duty to use legal procedure for the fullest benefit of the client's cause").

The Ethics Rules also expressly prohibit conflicts of interest, in part to ensure that an attorney complies with its duty of zealous representation. *See* Comment [7] to Ethics Rule 1.7 (citing the principles upon which Ethics Rule 1.7 is based, including the principle that "a client is entitled to wholehearted and zealous representation"). Those rules flatly prohibit conflicts of interest arising from situations where

the lawyer would have to "advance two or more adverse positions in the same matter." Ethics Rule 1.7(a). Of particular relevance here, the Ethics Rules also more broadly provide that, subject to the informed consent provisions, "a lawyer shall not represent a client with respect to a matter if . . . (2) such representation will be or is likely to be adversely affected by representation of another client." Ethics Rule 1.7(b)(2).

C. In this case, a clear conflict has emerged in contravention of these duties and restrictions.

In this case, the DOJ's multiple representations create a conflict within the ambit of Ethics Rule 1.7(b)(2): The DOJ's representation of FSOC will be, is likely to be, and apparently already has been, "adversely affected" by its simultaneous representation of President Trump and Treasury Secretary Mnuchin. And as a consequence, the DOJ has already run afoul of its duty to represent FSOC zealously, wholeheartedly, and in its best interest. *See* Ethics Rule 1.3 (requiring diligence and zeal).

i. The DOJ is engaged in multiple representations.

The DOJ represents multiple parties in connection with this litigation and in connection with the closely related review ordered by President Trump. First, the DOJ is counsel of record for FSOC, in accordance with the general rule that "the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice." 28 U.S.C. § 516

(2012). While Congress may authorize an agency to litigate on its own behalf, it has not done so with respect to FSOC.

At the same time, the DOJ also represents President Trump. The law provides that "[t]he Attorney General shall give his advice and opinion on questions of law when required by the President." 28 U.S.C. § 511 (2012). More specifically with respect to Presidential executive orders and proclamations, the DOJ's duties include "[p]reparing and making necessary revisions of proposed Executive orders and proclamations, and advising as to their form and legality prior to their transmission to the President; and performing like functions with respect to regulations and other similar matters which require the approval of the President or the Attorney General." 28 C.F.R. § 0.25(b) (2016) (emphasis added); *see also* Office of Legal Counsel, https://www.justice.gov/olc (last visited Jul. 25, 2017) ("All executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel [of the DOJ] for form and legality, as are various other matters that require the President's formal approval.") Finally, the Attorney General has a general incentive, if not duty, to promote the interests and objectives of the President, insofar as he or she serves at the pleasure of the President. "The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice." 28 U.S.C. § 503 (2012); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight*

Bd., 561 U.S. 477, 483, (2010) ("the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.")

Finally, the DOJ also represents the Treasury Secretary in this context. Although for some limited purposes, Congress has provided for non-DOJ lawyers to represent the Treasury Secretary, those provisions do not apply here. *See, e.g.*, 26 U.S.C. § 7452 (2012) (Chief Counsel for the Internal Revenue Service shall represent the Treasury Secretary in tax court). Moreover, the DOJ will be strongly inclined to serve, promote, and act in accordance with the Treasury's policies and initiatives, insofar as they derive from the President. *See* 31 U.S.C. § 301 (2012) ("(a) The Department of the Treasury is an executive department of the United States Government at the seat of the Government. (b) The head of the Department is the Secretary of the Treasury. The Secretary is appointed by the President, by and with the advice and consent of the Senate.") Thus, the DOJ also owes the Treasury Secretary a duty of zealous representation in connection with his review of FSOC's designation process mandated by the President—the very review being used to undermine FSOC's position in this case.

ii. The foregoing representations give rise to strong conflicts of interest.

The most compelling evidence of the DOJ's conflict of interest lies in its indefensibly weak opposition to MetLife's repeated motions to hold the case in abeyance for half a year. As discussed above and in Better Markets' initial opposition to MetLife's motion, the Memorandum provides no valid basis for a delay of this appeal, especially in light of the fact that the case is fully briefed and argued. The DOJ advanced none of the arguments that should have been brought to bear, instead acquiescing in a two-month delay—and seeking yet another 30 days of abeyance.

The DOJ's ostensible justifications for agreeing to and seeking periods of abeyance do not withstand scrutiny for several reasons. First, no deliberation should have been necessary at all since the motion plainly conflicted with FSOC's best interest in removing the crippling effects of the district court's ruling as quickly as possible, through a decision of this Court, or if necessary, an expeditious motion for reconsideration or petition for certiorari. Second, in fact, FSOC did hold a meeting on May 8, 2017, two weeks after the motion for abeyance was filed, at which the matter could have been discussed and yet apparently was not. *See Readout of Financial Stability Oversight Council Metting*, Treasury.gov (May 08, 2017), https://www.treasury.gov/initiatives/fsoc/council-meetings/Documents/May082017_readout.pdf (minutes unavailable).Third and finally, at any time since MetLife's initial motion on April 24th, the Treasury Secretary could have

sought delegated authority to approve opposition to the motion, *see* Rules of Organization of the Financial Stability Oversight Council, (July 21, 2010) at § XXX.6(i); (2) called a meeting and held a vote by teleconference, *id.* at (a) and (g); or (3) conducted a vote through written communication, *id.* at (h).

Further evidence of DOJ's conflict of interest lies in the Memorandum itself, which was clearly designed, with the DOJ's advice and counsel, to serve as a pretext for MetLife's abeyance motions. Particularly striking is the evident coordination between MetLife and the Administration, reflected in part by the Administration's hiring of a MetLife lobbyist to serve as special assistant to the President on financial policy, just two months prior to the issuance of the Memorandum. Also striking is that 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 at the center of this appeal as well as the arguments that MetLife advanced in its briefs. More generally, the Memorandum displays a marked hostility toward the designation process. The required review must focus almost exclusively on ways to curtail the designation process, to increase the burdens on FSOC going forward, and to protect the interests of potential designees. Memorandum, Section 1, (a)-(h). The Memorandum even goes so far as to impose a moratorium on future designations, other than emergency cases, pending completion of the review. *Id.* at Section 3.

And, DOJ's presumptive role in fashioning the Memorandum is clear, as its responsibilities include "[p]reparing and making necessary revisions of proposed Executive orders and proclamations, and advising as to their form and legality drafting and reviewing such memoranda."

In short, DOJ's participation in deploying the Memorandum, aimed at undermining FSOC and its designation authority in specific ways, sharply conflicts with its duty to zealously defend that same process as applied to MetLife, with respect to those same points of attack, in this appeal.[2]

II. The appropriate remedy is disqualification of DOJ.

Courts have broad discretion to disqualify attorneys due to conflicts of interest, and because conflicts can taint an entire firm or organization, the same remedy can in general also be applied on an organization-wide basis. See Ethics Rule 1.10

[2] To the extent DOJ's conflict of interest might be considered waivable, there is no evidence that FSOC has provided such a waiver. More importantly, the DOJ's conflict should be regarded as ***un***waivable. Because the President has injected himself into this case at least indirectly by issuing the Memorandum for the purpose of aiding MetLife's effort to avoid a decision, the two matters are really one and the same for purposes of a conflicts analysis. *See* Ethics Rule 1.7(a) ("A lawyer shall not advance two or more adverse positions in the same matter."); Comment [1] to Ethics Rule 1.7(a) (such conflicts are absolutely prohibited even with informed consent); *cf.* New Jersey Rule of Professional Conduct 1.7(b)(1) (explicitly disallowing public entity consent to conflicted representation), https://www.judiciary.state.nj.us/attorneys/assets/rules/rpc.pdf).

("Imputed Disqualification"). In the government context, individual government attorneys have been disqualified, and that remedy is plainly contemplated under the law. *See* 28 U.S.C. § 528 (2012) (requiring Attorney General to promulgate rules requiring disqualification of DOJ officers or employees where participation in investigation or prosecution would result in a "personal, financial, or political conflict of interest, or the appearance thereof").

The disqualification of a U.S. Attorney office or the DOJ as a whole is admittedly disfavored. *See, e.g.*, *United States v. Bolden*, 353 F.3d 870 (10th Cir. 2003) (reversing disqualification of U.S. Attorney office due to absence of specific findings on conflicts, and recapitulating appellate courts' aversion to that remedy);[3] *see also United States v. Farrell*, 115 F. Supp. 3d 746 (S.D.W. Va. 2015) (finding that although the members of the U.S. Attorney's Office were putative members of a

[3] The commentary in the Ethics Rules distinguishes government agencies from law firms and other private organizations for some purposes. Comment [1] to Ethics Rule 1.10 ("firm" in context of imputed disqualification does not include government agency); *see also United States v. Caggiano*, 660 F.2d 184, 191 (6th Cir. 1981) (affirming disqualification of attorney in the United States Attorney's Office but not entire office, citing ABA Code of Professional Responsibility). However, the commentary to the Ethics Rules also indicates that the prohibition on conflicts of interest in Ethics Rule 1.7(b) applies to government agencies unless "the resolution of such conflicts has been entrusted by law, order, or regulation to a specific individual or entity." Comment [35] to Ethics Rule 1.7. We are aware of no statute, order, or rule that entrusts the resolution of the conflict presented in this case to a specific individual or entity. Moreover, the conflict at issue stems from the DOJ's obligation, as an institution, to assist the President as he attempts to weaken the designation process in general and as applied in this case.

pending class action claim against defendants, the whole office was not impermissibly conflicted, resting largely on the potential disruption to the administration of justice). However, the case law also suggests that under all of the factors that courts consider when evaluating disqualification claims, disqualifying the entire DOJ from representing FSOC is appropriate and indeed essential under the unique circumstances present here.

First, as a factual matter, the existence of the conflict cannot seriously be doubted, in contrast with multiple cases where courts were simply unconvinced that a sufficiently strong conflict was present. *See Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197 (4th Cir. 1978) (government representation of four individual air traffic controllers presented no actual conflict); *Bolden*, 353 F.3d at 875 (concluding there was inadequate support for conflict because district court provided no findings); *United States v. Vlahos*, 33 F.3d 758 (7th Cir. 1994) (court found absence of real conflict); *Caggiano*, 660 F.2d at 667 (conflict not sufficiently strong to warrant disqualification of U.S. Attorney office); *United States v. Farrell*, 115 F. Supp. 3d 746 (S.D. W. Va. 2015) (conflict too speculative and remote); *Tannahill v. United States*, 25 Ct. Cl. 149 (1992) (no violation of ethics rules and no prejudice found). Here, by contrast, and as shown above, there is ample evidence of DOJ's conflict of interest.

Moreover, the impact of the conflict is profound. It is difficult to imagine a case where a conflict threatens to do more harm, given the historic importance of the issues presented in this appeal. Allowing the conflict to persist will increase the chances that FSOC's designation authority, as applied to MetLife and more broadly, will be permanently impaired, and it will continue to expose the financial markets to the threat of instability posed by MetLife itself. Also at stake is the integrity of the judicial process, the appearance of impropriety, and the corrosive effect that the DOJ's role will have on the public trust. *See Farrell*, 115 F. Supp. 3d at 762-63 (noting that the appearance of impropriety is an overriding concern, and doubts should be resolved in favor disqualification); Comment [1] to Ethics Rule 1.3 (duty of zealous representation is owed not only to client but also "to the legal system").

Finally, the facts here preclude application of the more narrowly tailored remedies that courts sometimes use to alleviate conflicts, such as the disqualification of one or more individual attorneys, the construction of a firewall, *see United States v. Frega*, 179 F.3d 793, 799 (9th Cir. 1999) (disqualification unnecessary because there was no evidence firewall had been breached), or any other step that would obviate the conflict or the need to disqualify, *see Nat'l Veterans Legal Servs. Program v. United States*, No. CV 16-745 (ESH), 2017 WL 354084, at *4 (D.D.C. Jan. 24, 2017)

(defining a class narrowly to avoid the potential for the DOJ to be representing adverse interests in the same case);[4] *cf. Tannahill*, 25 Cl. Ct. at 151 n.5 ("The court, however, takes no position in this Opinion on how the United States should be represented in the extremely rare case, if indeed such a case could occur, in which the Department of Justice has engaged in a conspiracy which so violated the rules of ethical conduct for the conduct of litigation, that some court feels action must be taken and that disqualification of one or more particular Justice Department officials cannot cure the problem.")

Disqualification of the DOJ as counsel for FSOC in this case is appropriate and necessary.

III. Regardless of whether the Court chooses to disqualify the DOJ, it should appoint independent counsel, or *amicus curiae*, to continue challenging the district court's ruling on the merits.

If the Court disqualifies the DOJ, then appointment of independent counsel is clearly necessary. FSOC is completely dependent on the DOJ to represent it in this and all litigation and it has no authority to litigate on its own behalf or to hire its own

[4] In fundamentally analogous situations, state courts have disqualified entire state attorney general's offices, citing the same rationale that applies here: The agency-client and its lawyer, the attorney general's office, are in conflict, so the representation is impermissible. "State officers and state departments of government deserve adequate legal representation. No representation can be adequate unless it is without conflicts on the part of counsel." *Motor Club of Iowa v. Dep't of Transp.*, 251 N.W.2d 510, 515 (Iowa 1977) (court gave agency's litigation approach precedence over position argued by state Attorney General).

counsel. The Court would therefore need to designate an independent counsel to represent FSOC in all future phases of this case. Such counsel would have a vital role to play in opposing further delays, pressing for reconsideration or a petition for certiorari if this Court were to affirm any aspect of the district court's decision, and opposing MetLife if it were to lose this appeal and take similar steps.

Even if the Court decides not to disqualify the DOJ, it should nevertheless appoint counsel for FSOC to ensure that a robust adversarial process is restored and that the errors of law embodied in the district court's decision—representing a real threat to the public interest—are corrected or at least fully and expeditiously addressed by this Court.

The law gives courts wide latitude to compensate for an adversarial vacuum by appointing or inviting counsel to argue a position, often in the role of an *amicus*. The Supreme Court has not hesitated to do so. *See, e.g.*, *Granville-Smith v. Granville-Smith.*, 348 U.S. 885, 885 (1954) (inviting *amicus curiae* to argue for the respondent). Other courts have repeatedly appointed *amici* where the parties are aligned on the issues presented. *United States v. Haldeman*, 559 F.2d 31, 138 (D.C. Cir. 1976) ("[W]hen no party to an appeal from the District Court undertakes to support the decision under review, this court may appoint an attorney as *amicus curiae* to defend that decision."); *Sec. & Exch. Comm'n. v. Citigroup Glob. Markets Inc.*, 673 F.3d 158, 169 (2d Cir. 2012) ("We recognize that, because both parties to

the litigation are united in seeking the stay and opposing the district court's order, this panel has not had the benefit of adversarial briefing. In order to ensure that the panel which determines the merits receives briefing on both sides, counsel will be appointed to argue in support of the district court's position."); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 138 (2d Cir. 2004) ("Because Gambale, her settlement in hand, did not take a position with respect to public access to the documents at issue, the motions panel, sua sponte, appointed pro bono counsel to brief and argue as *amicus curiae* the issue of public disclosure"); *Warren v. C.I.R.*, 282 F.3d 1119, 1122 (9th Cir. 2002) ("Nor is it at all unprecedented to appoint *amicus curiae* to argue a position not argued by the parties.").[5]

Especially relevant here are those cases in which the government changes or abandons it position, prompting courts to invite or appoint an *amicus* to take up the government's former position. *Bob Jones University v. United States*, 461 U.S. 574 (1983) (Solicitor General switched sides and declined to defend the Internal Revenue Service position, prompting Court to invite *amicus* participation) (order of appointment found at 456 U.S. 922 (1982)).

[5] The Federal Rules of Appellate Procedure and this Court's rules clearly contemplate court-appointed *amici*. *See* FRAP 21(b)(4)(court may invite amicus curiae to address mandamus petition); Circuit Rule 24 (addressing duties of *amicus curiae* appointed by Court in context of *in forma pauperis* proceeding); Circuit rule 29 (brief for an *amicus curiae* appointed by court is governed by provisions of Circuit Rule 28); Circuit Rule 34(e) (amicus curiae, other than one appointed by the court, will not be permitted to participate in the oral argument without leave of the court).

IV. This Court should deny all motions for a further abeyance.

MetLife's Renewed Motion for an Abeyance is wholly without merit. It rests essentially on the same arguments that MetLife advanced in its original motion, filed on April 24, 2017. Accordingly, for the same reasons Better Markets set forth in its previously filed May 8th opposition, the Court should deny the motion. For the same reasons, and because the claimed need for more time to deliberate is not credible, the DOJ's motion on behalf of FSOC seeking an additional 30-day abeyance should also be denied.

CONCLUSION

For the foregoing reasons, the Court should (1) find that the DOJ's representation of FSOC in this case and its simultaneous representation of the President and the Treasury Secretary in their effort to undermine this case create an impermissible conflict of interest; (2) disqualify the DOJ as counsel for FSOC in this case; (3) appoint independent counsel to represent FSOC and to continue challenging the district court's ruling; and (4) deny all motions for an additional abeyance period.

Respectfully submitted,

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Dated: July 25, 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with the type-volume limitation of Rules 29(a)(5) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure ("FRAP") because it contains 6,380 words, excluding the parts of the brief exempted by FRAP Rule 32(f) and Circuit Rule 32(e)(1).

I further certify that this *amicus* brief complies with the typeface requirements of FRAP Rules 29(a)(4) and 32(a)(5)(A) and the type style requirements of FRAP Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, with 14-point Times New Roman font, including serifs.

Executed this 25th day of July, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing brief 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 July 25, 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.

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