

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

METLIFE, INC.,

Plaintiff-Appellee,

v.

FINANCIAL STABILITY
OVERSIGHT COUNCIL,

Defendant-Appellant,

No. 16-5086

**MOTION OF BETTER MARKETS FOR LEAVE
TO FILE BRIEF AS *AMICUS CURIAE* 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 FURTHER ABEYANCE**

INTRODUCTION

Better Markets, Inc. (“Better Markets”) respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of Defendant-Appellant, the Financial Stability Oversight Council (“FSOC”).¹ This motion

¹ 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 this motion and proposed brief.

should be granted for the following reasons, as explained in further detail in the argument section below:²

(1) The Department of Justice's ("DOJ") representation of FSOC in this appeal, and its simultaneous representation of President Trump in his effort to derail this appeal and weaken FSOC's designation authority, create a clear and unmanageable conflict of interest. As a direct result of that conflict of interest, the DOJ is no longer able to provide FSOC with the wholehearted and zealous representation that all attorneys owe their clients. Exemplifying this failure is the DOJ's repeated capitulation to MetLife's motions seeking to place this case in abeyance for at least six months, even though it is now ready for a decision on the merits and even though the review of FSOC's designation process ordered by President Trump provides no valid basis for any delay. Such a delay would run directly counter to FSOC's best interest, because a resolution of this appeal as expeditiously as possible is necessary to move toward full restoration of FSOC's critically important designation authority, both as applied to MetLife and more generally when necessary to protect the financial stability of the United States.

(2) In light of the DOJ's conflict of interest, disqualification of the DOJ as counsel for FSOC, and appointment of independent counsel or *amicus curiae* to

² A Corporate Disclosure Statement is included at the end of this motion.

represent FSOC and to defend FSOC's designation of MetLife for supervision by the Federal Reserve Board, are both necessary and appropriate.

(3) Moreover, MetLife's renewed motion to hold this appeal in abeyance should be denied, for the same reasons advanced in Better Markets' previously-filed, May 8th brief in opposition to MetLife's original motion seeking an abeyance. The DOJ's motion on behalf of FSOC for an additional 30-day abeyance should also be denied: Further delay is clearly unwarranted and further deliberation is unnecessary.

(4) Because of the DOJ's conflict of interest, the adversary process has broken down in this case. As a result, the Court will not have the benefit of full and complete argument on the foregoing issues from the parties. The Court should therefore accept and consider the arguments set forth in the proposed accompanying brief.

(5) Better Markets has a strong interest in the outcome of the historic appeal, and it has the ability to provide the Court with helpful argument on the need for disqualification of DOJ, appointment of independent counsel or *amicus curiae*, and denial of the pending renewed motion for further abeyance. The attached proposed *amicus* brief provides those arguments, well-supported with the law and the facts.

(6) On May 8, 2017, Better Markets filed a brief as *amicus curiae* in opposition to MetLife's initial motion to hold this case in abeyance, and the Court accepted that brief.

ARGUMENT

I. Courts have broad discretion to accept *amicus* briefs, and such briefs are especially appropriate in the absence of fully adversarial representation.

Courts have very broad discretion to accept *amicus* briefs and leave to file them is typically granted when the *amicus* will aid the Court “by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties’ briefs.” *Voices for Choices v. Illinois Bell Telephone Co.*, 339F.3d 542, 545 (7th Cir. 2003; *see also Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (stating courts typically grant leave to file an *amicus* brief “when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”) (citing *Ryan v. Commodity Futures Trading Comm’n*, 125 F. 3d 1062, 1064 (7th Cir. 1997)). *Amicus* status is generally allowed when “the information offered is timely and useful.” *Ellsworth Assocs. v. U.S.*, 917 F. Supp. 841, 846 (D.D.C. 1996).

These considerations are most compelling where, as here, the adversary process has broken down and the parties have not only failed to present certain considerations to the Court, but have an affirmative disincentive to do so. When such circumstances arise, the need for additional argument from nonparties is especially acute, as courts have recognized. As explained by the Second Circuit: “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.” *U.S. Secs. and Exch. Comm’n v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 161 (2d Cir. 2012).

The accompanying brief meets these tests. It addresses extremely important issues with arguments and perspectives found nowhere in the parties’ filings, all of which are “relevant to the disposition of the case,” *see* FRAP 29(a)(3)(B). The precise degree to which the brief addresses the “merits” is not controlling, as there are times when nonparties offer valuable information and assistance beyond the scope of a brief on the merits. *Cf. United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 242 (2d Cir. 2016) (holding that the district court should have granted a nonparty motion to disqualify the defendant’s counsel). Indeed, district courts have at times allowed an *amicus* to cross-examine witnesses and present facts to the court. *See All. of Auto. Mfrs. v. Gwadowsky*, 297 F. Supp. 2d 305, 307-08 (D. Me. 2003); *see also, State v. Dir., U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 14 (1st Cir. 2001) (affirming a lower court decision to grant a group “*amicus-plus*” status”).³

³ In its opposition to Better Markets’ first motion for leave to file a brief opposing an abeyance, MetLife offered two arguments. First, it cited *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 424 n.16 (1984) to support the proposition that an *amicus* submission must be strictly limited to briefing on the merits. *See* Opp’n to Mot. of Better Markets, Inc. For Leave to File a Brief as *Amicus Curiae*, at 3 (May 11, 2017). But *Sony* addressed an entirely different proposition: that a collection of *amicus* briefs could not be used by a party to create a *de facto*

In addition, this case involves a breakdown of the adversary system that makes the accompanying *amicus* submission especially important. The DOJ has a conflict of interest that has induced it to acquiesce in MetLife's repeated motions for a lengthy abeyance, which undermine FSOC's best interest. The DOJ therefore has not and will not mount an appropriately forceful opposition to those motions. And it goes without saying that the DOJ is unlikely to acknowledge its conflicted status and its compromised role as an advocate for FSOC, and it is equally unlikely to press for the necessary remedy—appointment of an independent counsel or *amicus curiae* to represent FSOC and to vigorously defend its designation authority by seeking reversal of the district court's crippling rulings.

class of claimants or as evidence in a case, something Better Markets obviously does not purport to do. To the extent *Sony* were read to define the *amicus* role as one focused on analyzing the legal issues presented to the court, then the accompanying proposed brief passes that test: It addresses the legal issues presented by the DOJ's untenable conflicts of interest as well as the renewed motion for abeyance.

Second, MetLife challenged the length of Better Markets' brief, suggesting the length limit should be 2,600 words by analogy to FRAP Rules 27(d)(2)(A) and 29 governing oppositions to motions. *See* Opp'n to Mot. of Better Markets, Inc. For Leave to File a Brief as *Amicus Curiae*, at 3. However, that comparison is certainly inappropriate here. The proposed brief is focused primarily on important and complex issues that are distinct from opposition to the MetLife's renewed motion for an additional abeyance. Moreover, those issues—the DOJ's conflict of interest and the need to appoint counsel to press the merits on behalf of FSOC—are "relevant to the disposition of the case," *see* FRAP 29(a)(3)(B). Therefore, the more appropriate analogy is to FRAP 29(a)(5), which establishes the length limit governing *amicus* briefs on the merits. Under that rule, in conjunction with FRAP 32(a)(7)(B), the applicable limit would be 6,500 words, with which the proposed brief complies.

II. Better Markets' proposed brief supplies the Court with important and relevant information and arguments that the parties have not and will not provide.

Better Markets offers four arguments in the accompanying proposed brief found nowhere in the parties' filings.

First, the DOJ has a conflict of interest. It is attempting to represent FSOC as it fights to overturn the district court's rulings, to restore the designation of MetLife, and to more generally free that designation authority from the far-reaching and suffocating effects of the rulings below. At the same time, it is advising and assisting President Trump as he embarks on a political process specifically designed to prevent a decision on the merits of this appeal, to create a safe haven from designation for MetLife, and ultimately to permanently hinder if not disable FSOC's designation authority.

Second, the appropriate remedy is disqualification of the DOJ as counsel for FSOC. While disqualification of an entire government agency is an extraordinary remedy, it is warranted and in fact necessary under the unique and compelling circumstances of this case.

Third, whether or not the Court deems it appropriate to disqualify the DOJ as counsel for FSOC, it should appoint independent counsel or *amicus curiae* to ensure that reversal of the district court's opinion is vigorously pursued and that FSOC's designation authority is adequately protected.

Fourth and finally, MetLife's renewed motion for an abeyance should be denied, as should the DOJ's motion on behalf of FSOC. The grounds are essentially the same as those previously advanced in Better Markets' opposition to MetLife's initial motion for an abeyance: (1) the outcome of the review of MetLife's designation process ordered by President Trump is highly uncertain and speculative; (2) whatever recommendations it may contain, it is entirely uncertain whether, when, and how FSOC may choose to implement them, since, as a truly independent body, it cannot simply be ordered to do so by the President or anyone else in the Administration; and (3) delay of this case poses a genuine threat to the public interest, by enabling MetLife to evade designation notwithstanding FSOC's thoroughly considered judgment that it could threaten the financial stability of the United States, and by more generally hindering FSOC's ability to use that authority when necessary in the future to protect our financial system from crisis and collapse.

III. Better Markets has a strong and demonstrable interest in this case.

Better Markets is an independent, non-partisan, non-profit 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 rulemakings required by the

Dodd-Frank Act, Better Markets has filed more than 225 comment letters to 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 in general and it has been a leading advocate for promoting and protecting FSOC and its designation authority. Better Markets filed an amicus brief in support of FSOC in this appeal, and in the district court below. *See* Brief of *Amicus Curiae* of Better Markets, Inc. in Support of the Def.-Appellant (June 23, 2016); Brief of *Amicus Curiae* of Better Markets, Inc., *Metlife, Inc., Plaintiff, v. Fin. Stability Oversight Council*, 177 F.Supp.3d 219 (D.D.C. 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 FSOC's designation authority 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 FSOC's designation authority to preventing financial crises.⁴ And Better Markets has repeatedly highlighted the need to shield the American economy from unreasonable risks posed by the largest, most complex, most leveraged, and most interconnected nonbank financial institutions.⁵

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 actually very limited scope of an agency's obligation to conduct economic analysis, a theme of MetLife's arguments on the merits in this case.⁶

⁴ 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), http://www.bettermarkets.com/sites/default/files/documents/Kelleher%20Testimony%203-25-15_1.pdf

⁵ See Comment Letters from Better Markets to FSOC on Authority to Designate Financial Markets Utilities as Systemically Important (Jan. 20, 2011 and May 27, 2011); Comment Letter from Better Markets to FSOC on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies (Dec. 19, 2011), http://www.bettermarkets.com/sites/default/files/FSOC_Comment_Letters.pdf.

⁶ 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 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,

The DOJ's conflict of interest and MetLife's renewed motion to hold this appeal in abeyance undermines Better Markets' interests. Together, they threaten to delay the resolution of this case for a significant period of time, potentially indefinitely. And, allowing the district court decision to remain intact and uncorrected poses several threats. 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 FSOC's ability to exercise its designation authority in the future, as the decision erects hurdles that make FSOC's already daunting task nearly impossible.

Finally, and even more broadly, the decision threatens to impose unjustifiable burdens on all agencies. For example, if every statute with the word "appropriate" now requires its administering agency to conduct cost-benefit analysis before acting, as the district court opinion suggests, the entire process of regulating our financial markets will suffer a major setback, slowing the rulemaking process and making every rule an easier target for litigation challenge.

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).

CONCLUSION

For the foregoing reasons, Better Markets requests that the Court grant this motion and accept the accompanying *amicus* brief for filing.

Respectfully submitted,

Dated: July 25, 2017

/s/ Stephen W. Hall

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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.

Dated: July 25, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing motion 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.

Dated: July 25, 2017

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