

1 UNITED STATES COURT OF APPEALS  
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 - - - - - X  
4 METLIFE, INC., :  
5 Appellee, :  
6 v. : No. 16-5086  
7 FINANCIAL STABILITY OVERSIGHT :  
8 COUNCIL, :  
9 Appellant. :  
10 - - - - - X

Monday, October 24, 2016  
Washington, D.C.

11  
12  
13 The above-entitled matter came on for oral  
14 argument pursuant to notice.

15 BEFORE:

16 CIRCUIT JUDGES SRINIVASAN AND MILLETT, AND SENIOR  
17 CIRCUIT JUDGE RANDOLPH

18 APPEARANCES:

19 ON BEHALF OF THE APPELLANT:

20 MARK B. STERN, ESQ.

21 ON BEHALF OF THE APPELLEE:

22 EUGENE SCALIA, ESQ.

C O N T E N T S

ORAL ARGUMENT OF:

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Mark B. Stern, Esq.  
On Behalf of the Appellant

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Eugene Scalia, Esq.  
On Behalf of the Appellee

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P R O C E E D I N G S

1  
2 THE CLERK: Case Number 16-5068, MetLife, Inc.  
3 versus Financial Stability Oversight Council Appellant, Mr.  
4 Stern for the appellant, Mr. Scalia for the Appellee.

5 ORAL ARGUMENT OF MARK B. STERN, ESQ.

6 ON BEHALF OF THE APPELLANT

7 MR. STERN: May it please the Court, I'm Mark  
8 Stern for the Financial Stability Oversight Council. After  
9 an elaborate process that took about a year and half, the  
10 Council determined that the material distress, financial  
11 distress at MetLife could threaten the nation's financial  
12 stability.

13 Now it's undisputed that that is a relevant  
14 statutory standard and it's also undisputed that MetLife  
15 considered each of the specified factors that are laid out  
16 in the statute to inform the Council's determination.

17 Now when the District Council set aside the  
18 collective determination of the nation's chief financial  
19 regulators, which by the way is a non-delegable  
20 determination that has to be made by a two-thirds vote. The  
21 Court cited two departures from the Council's own guidance  
22 and one departure from what the Court believed was required  
23 by the statute. And the departures from the guidance were,  
24 the Court's view, that the Council was required to determine  
25 the likelihood that, or at least consider rather, consider

1 the likelihood that MetLife itself would experience material  
2 financial distress and it also found that the Council had  
3 failed to predict with adequate specificity the ways in  
4 which material distress at MetLife could destabilize the  
5 economy.

6 The statutory departure that the Court identified  
7 was a failure to do a cost benefit analysis.

8 JUDGE SRINIVASAN: Can we start with the first  
9 issue you raised about the departure from the guidance on  
10 the question of likelihood that the company would fall into  
11 financial distress. Is it your view that the guidance just  
12 cannot be read that way or is it your view that the guidance  
13 need not be read that way and the Council later on flushed  
14 out that it need not be read that way and wouldn't?

15 MR. STERN: We don't actually think that it can be  
16 read that way and we think that there is a mention of  
17 vulnerability in the statute that the District Council  
18 relied on. But what the Council specifically said was it  
19 wasn't adding any new factors that weren't set out in the  
20 statute itself. And it explained that there were, that this  
21 category, you know, that it described as being sort of  
22 related to vulnerability. Sort of indicated what the  
23 factors were and then it's not controverted that it applied  
24 all of those factors.

25 Now the Council at no point --

1           JUDGE SRINIVASAN: So if the argument is that it  
2 can't be read that way, which is the more aggressive  
3 position, can I just ask you to address there's versions of  
4 it, but in your brief I guess there's an addendum that has  
5 the guidance in it. And if we look at the portion that  
6 talks about leverage and it's the addendum page 17, under  
7 the heading leverage, the first sentence is, leverage  
8 captures a company's exposure or risk in relation to its  
9 equity capital. Leverage amplifies a company's risk of  
10 financial distress in two ways and then it goes on to  
11 discuss two ways, the subsequent two sentences.

12                   And then subsequently, it says leverage can also  
13 amplify the impact of the company's distress on other  
14 companies. So that part of it clearly is speaking to ripple  
15 effects for the broader economy.

16           MR. STERN: Right.

17           JUDGE SRINIVASAN: On the sentences before that,  
18 the first and the second, how do you read those sentences in  
19 support of your conclusion that the guidance cannot be read  
20 to speak to likelihood that a company will fall into  
21 distress?

22                   MR. STERN: What the Council is trying to  
23 determine is not whether but how distress will affect an  
24 institution in this case, MetLife, and how it's going to  
25 affect that institution is relevant because in turn, as Your

1 Honor suggests, leverage, you know, liquidity, maturity,  
2 mismatch, all of those things are ultimately relevant to the  
3 determination that the Council is required to make, which is  
4 if there is financial distress, material or financial  
5 distress at a company, will that distress have like a  
6 destabilizing include that material or financial distress  
7 have a destabilizing impact. That's the only ultimate  
8 question.

9 JUDGE SRINIVASAN: So that's definitely right or  
10 it seems that you have the strongest position in that  
11 respect to the sentence that follows first and second. And  
12 the sentences that are first and second, it sounds to me  
13 like what you're saying is those don't go to the likelihood  
14 that the company will fall into financial distress, those go  
15 to the implications for the company if there is financial  
16 distress.

17 MR. STERN: Yes, that's how the Council has  
18 understood this throughout. It did it in its previous  
19 determinations, made clear throughout this process that  
20 that's what it was doing. It provided MetLife with a  
21 proposed designation which made clear how it was analyzing  
22 it. There's no sort of argument here that MetLife that in  
23 some way was prejudiced by the Council's understanding of  
24 its guidance. You have to make all the arguments, present  
25 all the evidence. It argued to the Council that the Council

1 should consider its likelihood of material distress and  
2 understood that that isn't what the Council was doing, the  
3 Council responded to that and you know there's the  
4 discussion of it in its final determination.

5           But that's consistent both with the overarching  
6 statute and everything that the Council has ever done and  
7 there is a reason for that. Because the idea that you could  
8 predict, I mean among other things, the idea that you could  
9 predict the likelihood that a particular entity is going to  
10 experience material financial distress is not what Congress  
11 had in mind.

12           Congress was reacting to events like the collapse  
13 of AIG. If you would have had to scroll back to 2005 and  
14 predict whether it was likely that AIG was going to  
15 experience material financial distress, probably the only  
16 people who would have said that were the guys in the big  
17 (indiscernible) who sort of were out ahead of everybody.  
18 Nobody else was thinking that. And the idea that you could  
19 predict with any kind of specificity what losses would be  
20 and who would experience them.

21           Again, AIG is instructive. I mean AIG down to  
22 its last weekend was increasing its estimates of its  
23 liquidity shortfall, thereby sort of repeatedly doubling  
24 over the course of days what it was. So that the idea that  
25 sort of the Council looking into the indefinite future is

1 going to make a prediction about the financial health --

2 JUDGE RANDOLPH: It did make a prediction. The  
3 prediction was there's 100 percent chance it's going to fail  
4 and now this is, so we'll just take a look at what the  
5 consequences are. That's a prediction isn't it?

6 MR. STERN: No, Your Honor, I mean certainly the  
7 Council never predicted that there's 100 percent chance that  
8 MetLife is going to fail. What the Council took as an  
9 assumption and that's what the statute --

10 JUDGE RANDOLPH: That's what the assumption is.

11 MR. STERN: Well, the working assumption is that  
12 it's facing imminent insolvency, that's set out both in the  
13 final determination and the guidance. So the question is if  
14 you're in that position, how is that likely to affect you  
15 and if you are a highly leveraged company, if you've got a  
16 mismatch between what money you think you owe and the money  
17 you think you've got in terms of your ability to liquidate  
18 your assets, if you were engaged in certain kinds of  
19 transactions. All of those things are going to make you  
20 more likely to have an effect on the broader market than if  
21 you are, you know, have little leverage, you know, and are  
22 highly liquid.

23 And then size and interconnectedness are of course  
24 crucial. I mean these things are all related.

25 JUDGE MILLETT: Can I ask, where you think in the

1 Council's final determination are the best pages where it  
2 applied vulnerability in the way that you are describing it  
3 here?

4 MR. STERN: Gosh, the best pages.

5 JUDGE MILLETT: Because at least in the executive  
6 summary to start they lay out vulnerability but then they  
7 seem to only talk about transmission which I felt was the  
8 second half of the test. And so I'm trying to see where  
9 they're clearly embracing this under (indiscernible) and  
10 vulnerability.

11 MR. STERN: Yes, I mean I think a whole bunch of  
12 the like, I mean, the Council talks about leverage at JA-  
13 554, and it talks about --

14 JUDGE MILLETT: Could you start on JA-390, so I'm  
15 just starting with the executive summary. But they talk  
16 about vulnerability and then all these factors are relevant  
17 and here they're talking about leverage, liquidity risk and  
18 maturity mismatch. So your three vulnerability factors a  
19 relevant to assessment of whether and how material financial  
20 distress at MetLife could be transmitted to other financial  
21 firms and markets. And that seemed to me the second half of  
22 this analysis because first we see how bad it's going to  
23 affect you, what kind of wherewithal do you have as a  
24 company to survive this. And if it's not good what, the  
25 second inquiry is what effect is whatever you're having to

1 do going to have, how is it going to be transmitted?

2 MR. STERN: Yes, I mean --

3 JUDGE MILLETT: So that's why I'm confused.

4 MR. STERN: -- yes, no, I mean I think that the  
5 thing is that they're both true. I mean these are all, I  
6 mean, as the Council explained it was that these are  
7 interrelated factors and Congress understood them to be  
8 interrelated factors. So you know, your leverage, you know,  
9 the kinds of businesses you engage in go to your  
10 vulnerability, you know, in the sense that how is it, like  
11 what are you likely to do. You know what problems what will  
12 you be facing and then those feed also directly into the  
13 questions of your size, your interconnectedness, who are you  
14 dealing with, you know, what it will be, the impact.

15 But you know the Council goes through, I mean it's  
16 indicated what --

17 JUDGE SRINIVASAN: I thought what Judge Millett  
18 was getting at is that there's a sequence. The sequence is  
19 distress could come up along three points in the continuum.  
20 The first would be likelihood that the company is going to  
21 fall into distress and MetLife's position is that has to be  
22 considered. Your position is no, that doesn't have to be  
23 considered. In fact, the guidance doesn't talk about  
24 considering that at all.

25 The second step is in conditions of distress, how

1 does it affect the company? And then the third is, if it  
2 affects the company then what are the outward ripple effects  
3 of that for the broader market.

4           So on the second part of that continuum, the  
5 question is where in the executive summary is that second  
6 part addressed and --

7           MR. STERN: That I would have to look back to see  
8 what I can tell you is that there is no dispute that  
9 MetLife, rather the Council, considered all the factors that  
10 it deemed relevant that it sort of grouped as being sort of  
11 the more inward looking. And it looks at those factors not  
12 because it's trying to predict whether any institution is  
13 going to fail under certain circumstances. You know there  
14 may be lots of institutions that are going to fail and that  
15 could be very unfortunate for the stockholders of those  
16 institutions --

17           JUDGE SRINIVASAN: Well how do you read this  
18 sentence, because on that same page on that paragraph, the  
19 one that Judge Millett is looking at on JA-390, there is  
20 after a semicolon it talks about what Section 4.3.3 is going  
21 to describe. Section 4.3.3 describes how MetLife Securities  
22 lending activities result in a liquidity risk and a maturity  
23 mismatch that could cause the company to rapidly liquidate  
24 invested collateral to produce the necessary liquidity to  
25 return cash collateral to securities lending counterparties.

1 And when it talks about the company do you read that to mean  
2 likelihood that the company is going to fall in distress?  
3 Do you read it to mean likelihood or consequences for the  
4 company in conditions of distress or do you read it to go to  
5 the third part which implications for the broader market?

6 MR. STERN: Well, both. I mean what it's saying  
7 is that if you have leverage and that if people can demand  
8 money from you sort of based on all sorts of financial  
9 instruments, and particularly if you have, you know, a  
10 hundred billion dollars, you know, or 90 billion just in the  
11 capital, you know, markets alone that would fall into that  
12 category.

13 Then when you are in trouble what you may do is to  
14 try to liquidate your assets and then that in turn flows  
15 into the way you're going to affect the broader market. So  
16 that there's an increase, are you the sort of company that  
17 will need to liquidate assets? Is the way you're doing  
18 business sort of getting you there, and then what will the  
19 result be if you're an enormous interconnected company. But  
20 that's going to have a big effect on the broader market.  
21 You know if you're not, you know, like that, you know, you  
22 may be in trouble. But it's not going to have enormous  
23 reverberations throughout the entire economy.

24 JUDGE SRINIVASAN: Yes.

25 MR. STERN: I see that my time is up.

1 JUDGE SRINIVASAN: Do you have anymore, Ray?

2 JUDGE RANDOLPH: No.

3 JUDGE SRINIVASAN: Pat, do you have any questions?

4 JUDGE MILLETT: No.

5 JUDGE SRINIVASAN: Thank you.

6 MR. STERN: Thank you, Your Honor.

7 ORAL ARGUMENT OF EUGENE SCALIA, ESQ.

8 ON BEHALF OF THE APPELLEE

9 MR. SCALIA: Good morning, may it please the  
10 Court.

11 JUDGE SRINIVASAN: Mr. Scalia.

12 MR. SCALIA: Eugene Scalia, representing MetLife.

13 All MetLife asks in this case is that FSOC be held to the  
14 standards articulated by the Supreme Court in the State Farm  
15 decision and applied by this Court for decades. Including  
16 that it adhere to its own standards, that it based its  
17 decision on evidence and applied expertise, rather than  
18 implausible speculation and ipse dixit, that it respond to  
19 significant evidence and argument in the record, and that it  
20 consider the impact of its action, including superior  
21 alternatives to that course of action, and finally, that it  
22 accord due process.

23 On the topic of its standards, let me begin with  
24 vulnerability but also talk about how it also departed from  
25 its own standards when it came to the exposure analysis.

1 First, Judge Srinivasan, in addition to those passages that  
2 you pointed out in the fun ruling sort of guidance that  
3 seemed to be concerned about the occurrence of financial  
4 distress, I understand would also mention and I don't have  
5 the same pagination as you do, but later there are  
6 references, for example to how well the company quote, is  
7 matching the re-pricing and maturity of its assets and  
8 liabilities. Is matching. How is it doing it currently?  
9 Because maturity mismatch is one potential onset of  
10 financial distress in a generally bad economic environment.

11 It also talks, this is page 26 in our appendix,  
12 also discusses whether there is regular reporting to state  
13 regulators. Well, that naturally goes the question of  
14 whether the state regulators are on the job and able to  
15 discern conditions that could be indications of the likely  
16 onset of distress. Whether there are reporting obligations,  
17 is going to be far less helpful once a company already is  
18 there. Even more importantly though, if I could emphasize  
19 the dog that doesn't bark.

20 The premise, the starting point of this final  
21 designation is as Judge Randolph said, total failure. That  
22 was an easy thing to say in the final rule of interpretive  
23 guidance. We are going to assume an onset of absolutely  
24 totally debilitating financial distress and it's actually  
25 remarkable that Mr. Stern has cited you to Joint Appendix

1 454 because at that page there is an assumption actually of  
2 deep insolvency and on the same page, FSOC goes on to assume  
3 something even worse than a deep insolvency.

4           Judge Millett, this is on part relevant to some of  
5 the questions that you had, because they actually never even  
6 do their own made for litigation inquiry regarding  
7 vulnerability to vulnerability. They just plunge MetLife to  
8 whatever depths are necessary without any serious  
9 examination of how it got there. And again on the question  
10 of what was said in the final rule and interpretative  
11 guidance, they said they were going to look at two things  
12 and some of your questions picked up on this. Transmission  
13 to third parties, vulnerability of MetLife. But on those  
14 pages that we were looking at 390 to 391, those are  
15 conflated and all they talk about is three different times  
16 they talk about transmission to third parties or impact on  
17 third parties. That second prong vulnerability of MetLife  
18 is just gone from that analysis.

19           I also want to note that what FSOC did was it told  
20 state regulators it was going to examine MetLife's  
21 vulnerability to financial distress and on that basis sought  
22 thousands of pages of documents from it that went to  
23 MetLife's stability and soundness, such as stress tests  
24 going back to 2007. What happened --

25           JUDGE MILLETT: Can I ask you something? Is your

1 view that the statute itself requires the Council to find an  
2 actual likelihood of falling into financial distress or that  
3 that's entirely a product of the guidance?

4 MR. SCALIA: We believe that that's the best  
5 interpretation of the statute. But --

6 JUDGE MILLETT: And then what statutory, okay so  
7 can you help me with the statutory language, because I'll  
8 just flag a couple of things for you. One is in 5322 when  
9 they set out the purposes and duties of a Council in  
10 (a)(1)(H) I think.

11 MR. SCALIA: That's correct.

12 JUDGE MILLETT: They phrase it as terms of  
13 companies that may pose risks in the event of their  
14 financial distress or failure and that obviously the money  
15 language most folks are talking about in 5323(a)(1) emphasis  
16 is on could pose. Neither of those are posing a threat to  
17 the financial stability because of their material financial  
18 distress. It's all in the event of or could it pose and  
19 hypothesizing language like that, which doesn't seem to me  
20 as a textual matter in the statute but it's by the guidance  
21 right now in the statute itself to command a specific  
22 finding that they are likely to fall into financial  
23 distress, let alone the repercussions of it. What text do  
24 you --

25 MR. SCALIA: The Council, of course the Council --

1 JUDGE MILLETT: -- how am I misreading that in the  
2 text?

3 MR. SCALIA: -- read the statute as we do would be  
4 our first submission on that.

5 JUDGE MILLETT: All right. But I just --

6 MR. SCALIA: When you look at the statutory  
7 factors, several of them go to the likelihood of the onset  
8 of financial distress, if you're highly leveraged in a bad  
9 market, you're more likely to experience financial distress.

10 JUDGE MILLETT: Well that could go either way,  
11 right?

12 MR. SCALIA: It could go to both.

13 JUDGE MILLETT: Okay. So it doesn't compel.

14 MR. SCALIA: But it certainly does go to that.

15 JUDGE MILLETT: Well, but it depends on what  
16 question, I mean looking at leverage itself doesn't at least  
17 to me, answer the question of are we asking are they really  
18 leveraged so that they are likely to go in distress or if  
19 bad economic times come, what kind of internal financial  
20 wherewithal do they have to withstand that in a way that  
21 doesn't take others down with it? And so what in the text  
22 compels because I thought said the statute requires them to  
23 do it.

24 MR. SCALIA: Look, I wouldn't say there's an  
25 explicit statutory compulsion and I admit it would be a

1 closer question, but we think it's unreasonable under  
2 Chevron Step 2 for this agency to --

3 JUDGE MILLETT: Okay.

4 MR. SCALIA: -- embark on the process of  
5 designating a company and settling for the enormous costs if  
6 there is no real foreseeable possibility that it will  
7 experience financial distress in the horizon over which they  
8 have the opportunity to review.

9 JUDGE MILLETT: But you agree we're all in Chevron  
10 Step 2 language on what this you know --

11 MR. SCALIA: I don't think there's an explicit  
12 statutory command that directly states it. But I think  
13 there is no permissible --

14 JUDGE MILLETT: So I think that means you agree  
15 we're in Chevron Step 2?

16 MR. SCALIA: I agree that, I would say that read  
17 as a whole it is unreasonable to view the statute and read  
18 as a whole the clear statutory command is that you need to  
19 consider whether this company is reasonably likely to --

20 JUDGE MILLETT: So is that Chevron Step 1 or 2?

21 MR. SCALIA: I would characterize it as Chevron  
22 Step 1 on balance. But it's certainly Chevron Step 2 it's  
23 just totally an unreasonable ascending agency on a fool's  
24 errand.

25 JUDGE MILLETT: What do you with in the event of

1 language? Or may pose --

2 MR. SCALIA: I think it still begs the question is  
3 that event going to come about? The language in 5323 is the  
4 more specific to this enterprise and I think it's stronger  
5 for us.

6 But if I could also mention, if I could turn to  
7 the other respectively stated party from their standards  
8 which is their exposure analysis, because there they have  
9 departed from their own standards not only as stated in the  
10 final rule of interpretive guidance where they said they  
11 would consider whether exposures were significant enough to  
12 materially impair. They restated that standard in the  
13 designation itself and yet never applied their own tests.

14 MetLife came forward with expert evidence that its  
15 third party exposures were not significant enough to  
16 materially pair it. For example we --

17 JUDGE SRINIVASAN: No, no, they did incant that  
18 language in the conclusion.

19 MR. SCALIA: They incanted it, exactly.

20 JUDGE SRINIVASAN: On both with respect to both of  
21 their routes.

22 MR. SCALIA: And wherever they cite in their brief  
23 that's exactly what they're doing, they're invoking a term.  
24 But they never applied the test and they simply paid no heed  
25 to evidence we showed that there wouldn't be material

1 impairment.

2 I want to talk for a moment just about the stress  
3 testing. What we did was we said let's look at other  
4 federal models that some of these member agencies use to  
5 test the fortitude of a company and we showed that the  
6 impact of a MetLife on the major banks and the major banks  
7 are central to their analysis. We said the impact of a  
8 MetLife failure on the major banks, even assuming virtually  
9 a total loss, would be for example, 1/73 of the impact of an  
10 adverse economic event that they withstood under the stress  
11 test. So we said FSOC if this bank can withstand the stress  
12 test, surely it won't be materially impaired by MetLife's  
13 failure where we show --

14 JUDGE SRINIVASAN: Okay. So can I just ask you a  
15 question, a context sitting question about this? So this  
16 deals with the way that the FSCO in the guidance defined how  
17 it was going to apply the threat standard and it says that a  
18 threat to the financial stability exists if there would be  
19 an impairment of financial intermediation or of financial  
20 market functioning that would be sufficient severe to  
21 inflict significant damage on the broader economy. So we're  
22 talking about the application of that verbiage.

23 MR. SCALIA: Although there is other verbiage  
24 throughout both the final rule and interpretative guidance  
25 and the designation decision that talks about impacts on the

1 counterparties.

2 JUDGE SRINIVASAN: Yes.

3 MR. SCALIA: The theory is domino effect and they  
4 never applied the domino theory, they just added it up and  
5 said well that's a lot of exposure without taking the  
6 account of federal stress test rules which showed there  
7 wouldn't be a significant impact without taking account of  
8 federal rules regarding collateral. We tried to explain to  
9 them, just context, the CEO of this company told the Council  
10 this was the biggest threat to the company in its history,  
11 getting designated.

12 And so one thing we said look at your federal  
13 banking rules regarding collateral, treat collateral in the  
14 same way here as you treat it under the federal banking  
15 rules and our exposure is dropped by 30 billion dollars.  
16 But FSOC said we're not going to use federal rules regarding  
17 how collateral is treated. So Mr. Stern talked about how  
18 hard the task before FSOC was. But when a task is hard, you  
19 use these expert federal models that existed elsewhere. You  
20 certainly respond to the evidence on stress testing, on the  
21 analogy that we drew to fines the Government imposed and how  
22 much larger they were than a MetLife failure. It's not that  
23 the Government had a bad argument, it ignored us.

24 JUDGE SRINIVASAN: But so is your argument that  
25 it's arbitrary and capricious, for example, on stress tests

1 not to conduct the stress test analysis that you put  
2 forward? It's arbitrary and capricious because it conflicts  
3 with the guidance or is your argument that it's just  
4 arbitrary and capricious not to take that into account  
5 because it's an obvious thing that should have been taken  
6 into account?

7 MR. SCALIA: Plain old State Farm is significant.

8 JUDGE SRINIVASAN: Okay. So we're talking about  
9 the second category --

10 MR. SCALIA: Significant evidence argument in the  
11 record that they didn't acknowledge a response. They just  
12 ignored it and that was just garden variety arbitrary and  
13 capricious particularly in a context where its federal rules  
14 and where they said you know we need guidance. Another  
15 place that they did it was with respect to simply their  
16 treatment of the state insurance expertise that Congress  
17 placed on that body.

18 The state, impotent state insurance experts on  
19 FSOC said they dissident, they said this is totally  
20 improbable and they laid out in detail why it was that state  
21 regulators would intervene, how they always do that and FSOC  
22 ignored that again. So it's claiming deference to  
23 expertise, but it ignored --

24 JUDGE MILLETT: Can I just ask you one thing on  
25 the stress test, how do stress test measure impact on others

1 as opposed to the ability of the company itself again, its  
2 own internal wherewithal?

3 MR. SCALIA: The stress test that is conducted by  
4 the fed against the banks hypothesizes an economic impact on  
5 a bank and hit sit really hard, a severely adverse scenarios  
6 and says how did that bank withstand it? What we did is we  
7 said let's impose, let's look at the impact on that bank of  
8 a MetLife failure compares to the adverse economic impact  
9 the fed found that bank withstood. So we didn't suggest  
10 that stress test be done on MetLife, we said let's compare  
11 the impacts and survivability and we said MetLife's impact  
12 is minuscule compared to what you, the federal government,  
13 said that bank can withstand. How can you now turn around  
14 and tell us that we're a threat to a material impair that  
15 very same bank?

16 If I could talk --

17 JUDGE MILLETT: Well isn't the question that's  
18 asked the impact of a MetLife failure or your failure, at a  
19 time of already a severe downturn in the economy as opposed  
20 to a healthy economy?

21 MR. SCALIA: I'm sorry?

22 JUDGE MILLETT: So it's not just that MetLife is  
23 an island onto itself facing financial distress and everyone  
24 else is having rosy days. The assumption for the analysis  
25 here is we kind of have to assume things are really going

1 badly and MetLife is at least on the brink of insolvency or  
2 severe financial failings and the rest of their partners, or  
3 those that they interconnect with are themselves facing  
4 maybe not as far down the road as MetLife is hypothesized to  
5 be, but facing a severe economic downturn. And so how does  
6 a stress test capture that sort of double whammy?

7 MR. SCALIA: Well, they certainly did set the  
8 stage to make it much easier for themselves by drawing all  
9 those adverse assumptions. But the short answer, Your  
10 Honor, is they just never responded to the analogies that we  
11 drew to assess what --

12 JUDGE MILLETT: Did your stress test, your  
13 analogy, your evidence analyze it on those terms? Or did it  
14 look at stress tests in ordinary financial times and then  
15 that context for some reason a single failure of MetLife  
16 with everything else going along normally, what impact it  
17 would have?

18 MR. SCALIA: We did not, what we compared was a  
19 total loss of MetLife exposure, which was unreasonable, for  
20 reasons we elsewhere explained.

21 JUDGE SRINIVASAN: Right.

22 MR. SCALIA: With an adverse economic environment  
23 that was severely adverse that the banks can withstand. We  
24 didn't put another context around the MetLife impact on the  
25 counterparty.

1           On the other hand, they never even considered the  
2 evidence, they didn't respond in any way. Under Chenery  
3 (phonetic sp.) they're just out on that issue. Another  
4 issue they're out on that I do want to speak before I sit  
5 down, is the asset liquidation scenario.

6           Those 84 pages of the designation can be put aside  
7 for a simple reason. They all assume the entire asset  
8 liquidation scenario assumes that MetLife won't act to stop  
9 and that the states won't act to stop the return of  
10 shareholder, the return of policies. The scenario they  
11 hypothesized was that MetLife was in such terrible shape  
12 that millions of policyholders are demanding their policies  
13 back and yet nonetheless --

14           JUDGE MILLETT: It's not just policyholders,  
15 right? There's a lot of people that hold that the way  
16 MetLife system is set up, a lot of people hold a lot of  
17 money on MetLife. It's not just life insurance policies  
18 that are going to get turned in. That was, I mean I don't  
19 think that's quite fair for their analysis. It was much  
20 more comprehensive given sort of short term debt that  
21 MetLife holds.

22           MR. SCALIA: Those enormous --

23           JUDGE MILLETT: And other investments.

24           MR. SCALIA: -- Your Honor those enormous numbers  
25 they generated for the asset liquidation were predominately

1 from insurance liabilities. And it's totally, it disregards  
2 the state regulatory system. It disregards the state --

3 JUDGE MILLETT: They didn't disregard it, they  
4 analyzed it and they said look no one state regulator and  
5 the whole point is that they're doing their own little  
6 pockets of what these businesses do and that there's nobody  
7 looking at MetLife as a whole and what that impact is going  
8 to be.

9 MR. SCALIA: But Your Honor, MetLife also had its  
10 deferral authority that would have enabled it to stop the  
11 outflow and what FSOC said was that MetLife might not  
12 exercise that, because it would send a negative signal which  
13 is a preposterous response, the deferral of power is  
14 required by state law. If your policy holders are coming to  
15 you by the millions to end their policies by you're not  
16 going to be worried about sending --

17 JUDGE MILLETT: What if it's not policyholders?  
18 What if it's people who hold debt?

19 MR. SCALIA: But Your Honor I'm getting at a  
20 slightly different point which how irrational it was for  
21 them to assume that MetLife wouldn't defer because it didn't  
22 want to send a negative signal, a death knell had already  
23 been sent under the scenario 3, which MetLife told them was  
24 totally implausible, MetLife was not writing business  
25 anymore. If you called and tried to get a MetLife policy

1 they'd say we don't do that anymore. And again, the average  
2 Joe policyholder is banging down the doors to return his  
3 life insurance policy.

4 FSOC said that in that circumstance, MetLife  
5 wouldn't exercise deferral even though MetLife said we would  
6 have a fiduciary duty to do so. In every other insurance  
7 failure that's been examined either there was deferral  
8 exercised or state intervention. And Judge Millett, with  
9 respect to the efficacy of state intervention, you know,  
10 with all respect, it wasn't FSOC that had the expertise on  
11 that. It was the state insurance regulators. And there  
12 were about 10 different letters submitted by state insurance  
13 regulators who said we do this regularly and it works very  
14 well. And the non-insurance experts on FSOC just speculated  
15 that well maybe it wouldn't work here. But that's not  
16 grounded in expertise. They essentially engaged in a flight  
17 from the expertise that Congress put on that body.

18 JUDGE SRINIVASAN: Can I ask you to address a  
19 broader question which is the statute has provisions that  
20 deal with banks, bank holding companies and then it has  
21 provisions that deal with non-financial companies. And as  
22 to the former it occasions the Federal Reserve's authority  
23 anytime there is 50 billion dollars in assets period,  
24 without worrying about a lot of the things that we've been  
25 talking about this morning. Because it assumes that there's

1 an interconnectedness and ripple effect and things of that  
2 nature that justify the added regulatory burden.

3           If the FSCO goes through the analysis and  
4 determines that a company like MetLife has a similar scale  
5 of interconnectedness and it's similarly significant in the  
6 overall economy, then doesn't the fact that the statute  
7 speaks in terms of 50 billion automatically occasioning  
8 Federal Reserve authority suggest that a lot of the things  
9 we've been talking about this morning may be things that the  
10 FSOC could have looked at but that they weren't out of  
11 bounds for not looking at them?

12           MR. SCALIA: Judge Srinivasan, I agree there were  
13 other ways that this agency could have approached the  
14 designation of the non-banks. We're not asking you to  
15 ordain that there was one specific way that it could be  
16 done. What we're asking you to rule is that they set it out  
17 doing it in a particular way and then they did it in an  
18 unreasonable way they disregarded evidence, they didn't even  
19 respond to really important evidence, for example.

20           With respect to your question, more broadly, banks  
21 and insurance companies are different and that's precisely  
22 why having assets significantly in excess of 50 billion  
23 dollars when you're not a bank doesn't pose the same kinds  
24 of concerns that might in the bank and briefly banks are  
25 much more connected within the financial system. And

1 they're very prone to runs, one of the difficulties Judge  
2 Millett that we had with this run scenario they hypothesized  
3 is that it's a creature of the banking world where people  
4 have their money in a bank because they want ready access to  
5 their money, whereas if you buy a life insurance policy for  
6 a completely different reason.

7           MetLife hired a firm to examine the historical  
8 insurance failures and they reflected an extremely different  
9 pattern than the failure of a bank and in these analyses  
10 that Oliver Wyman did, the expert firm, it actually  
11 significantly increased the distress at MetLife and the  
12 asset sales were going on far beyond any historical model.

13           For example, Oliver Wyman's scenario 2 was AIG,  
14 which was a highly publically observe failure that took over  
15 place over several months before the federal government  
16 intervened. That was scenario 2. Nobody thinks scenario 2  
17 would adversely affect broader markets. Scenario 3 if you  
18 look at Joint Appendix 1187, you'll see the piece of assets  
19 sales which MetLife told FSOC was totally implausible it's  
20 far faster than had ever been seen from insurance company.

21           So we were willing to give some margin, some  
22 benefit of the doubt to be protective. That Oliver Wyman  
23 scenario 3 analysis still showed that MetLife could meet  
24 this totally unreasonable demand on its assets and still not  
25 adversely affect the economy. Remembering again that if the

1 state regulators do what they said they would do, what they  
2 historically do, what they're required by law to do, you  
3 would never be in that asset liquidation scenario.

4 JUDGE RANDOLPH: Can I ask you, I'd like before  
5 you sit down, one of the points you made as I understand it  
6 is that the Council never considered the impact of  
7 designation on MetLife. That the amicus brief filed by the  
8 academic experts points out that there is an executive order  
9 outstanding, issued by President Clinton and requiring the  
10 costs of regulation to be considered.

11 My question is does that executive order apply to  
12 this Council which is made of various individuals?

13 MR. SCALIA: I don't know if it applies by its  
14 terms, it is an unusual body. What I would --

15 JUDGE RANDOLPH: It's got executive officers.

16 MR. SCALIA: It does. I believe the majority of  
17 its voting members are indeed executive officers, now some  
18 of them are independent agencies.

19 JUDGE RANDOLPH: Right.

20 MR. SCALIA: So you have a difference there when  
21 it comes to the executive order. But what I would like to  
22 emphasize about that is first of all, again the Chenery  
23 Doctrine, which is so fatal to so much of what FSOC would  
24 like to argue now. They gave one reason for not considering  
25 the impact on MetLife in broader economy of what the CEO

1 stood before these powerful regulators and said was the  
2 biggest threat in the company's history. They gave one  
3 reason, and here's what it was.

4           They said well statutory sections A through J are  
5 the mandatory factors to consider. You're asking us to  
6 consider the adverse effects on MetLife in the broader  
7 economic under the catchall at K. They said well we're not  
8 going to consider it under the catchall at K because it's  
9 not one of the mandatory factors at A through J. I mean  
10 that is just the quintessence --

11           JUDGE MILLETT: I don't think that's what they  
12 said. I think they said it's not looking at the same  
13 concerns, it was sort of the, you know, words known by the  
14 company it keeps so that they wanted to make sure that when  
15 they talked about other risk related factors down there,  
16 that it would have the same face and it would face the same  
17 types of risks as the factors that were before it. Isn't  
18 that exactly more how they did it?

19           MR. SCALIA: That's their position now.

20           JUDGE MILLETT: Right. They didn't say it wasn't  
21 one of those other factors.

22           MR. SCALIA: They did. When you read that  
23 paragraph --

24           JUDGE MILLETT: What page is that?

25           MR. SCALIA: -- they gave, I don't have the

1 immediate page in front of --

2 JUDGE MILLETT: Sorry.

3 MR. SCALIA: -- me, I apologize, but I can find it  
4 quickly. They gave this all of one paragraph and in it  
5 their emphasis was on what the statute required and they  
6 said because it wasn't statutory required they weren't going  
7 to examine it. And again that makes hash out of a catchall.

8 I also want to emphasize that we were not asking  
9 for a quantitative cost benefit analysis in the manner, even  
10 of the executive order, Judge Randolph. All we were saying  
11 was because the statute is meant to be protective of  
12 designated companies, you ought to consider whether this  
13 will be protective or harmful and they said well it's not a  
14 statutorily mandated factor so we're not going to want to  
15 consider it.

16 JUDGE RANDOLPH: But I mean is as MetLife's  
17 argument on that score that the designation itself will  
18 enhance the possibility that MetLife will go into financial  
19 distress?

20 MR. SCALIA: What we explained was that it would  
21 make MetLife less profitable, weaker. It would harm the  
22 company and we didn't say it would drive it to bankruptcy.

23 JUDGE MILLETT: The designation or the prudential  
24 standards that the Board would impose?

25 MR. SCALIA: At the time that we were before FSOC

1 until literally the last day they were required to apply  
2 capital standards that were the same as those applied at  
3 banks and that's what we analyzed it under and those capital  
4 standards are extremely adverse for an insurance company.

5 JUDGE MILLETT: When you say they, are you talking  
6 about the Board or the Council?

7 MR. SCALIA: The Fed. But under any regime the  
8 capital standards apply to FSOC are required to be higher  
9 than those otherwise applied which means as a matter of law,  
10 once you're designated you have to have capital standards  
11 higher than the great majority of your competitors.

12 JUDGE MILLETT: My understanding is that the Board  
13 when someone is designated that makes an individualized and  
14 it's okay, you don't need to hunt for it. That's fine. I  
15 don't want to distract you. The Board then makes an  
16 individualized study and it may well, you're probably right  
17 in predicting there's certainly a good chance that it will  
18 impose those same requirements that it has out there. My  
19 question to you is more of a procedural one. If the problem  
20 is the consequences of the regulations themselves, do you  
21 have an opportunity, my assumption is you do, have an  
22 opportunity to challenge whatever regulatory plan the Board  
23 devises for MetLife and if so, I assume you'll be perfectly  
24 free to raise this cost argument there once we have an  
25 actual regulatory program in front of us to look at.

1 MR. SCALIA: Two part answer.

2 JUDGE MILLETT: Yes.

3 MR. SCALIA: As the law is now, because there was  
4 a Congressional amendment that very day, as the law is now,  
5 once you're designated, you must have higher capital  
6 standards which automatically makes you less profitable.

7 As the law was until literally the day of  
8 designation, those capital standards also had to be the  
9 heightened standards applicable to a bank. There are other  
10 things that fall immediately from designation. You are  
11 subject to fed oversight which is among the most intrusive  
12 forms of regulation in the federal government. When we  
13 prevailed in this case before the District Court it resulted  
14 in approximately a dozen federal bank examiners who had been  
15 on our property for months to have to leave and yet,  
16 remarkably, the federal government argues in its brief that  
17 our constitutional interest weren't even implicated in this  
18 case. So there are a number of things that fall from  
19 designation.

20 Your Honor, it's JA-390, 391, I'm sorry, I didn't  
21 have it.

22 JUDGE MILLETT: Okay. I'm sorry to have  
23 distracted you in that.

24 MR. SCALIA: I also want to briefly mention --

25 JUDGE MILLETT: So that was the executive summary

1 where they did that.

2 MR. SCALIA: Your Honor, that's what's disturbing  
3 about it. They gave one paragraph to our argument that you  
4 are going to harm this company. The CEO stood before these  
5 very powerful federal regulators, and said this is one of  
6 the greatest threats we face and they said that the impact  
7 of their actions was not of their concern, which is so  
8 extraordinary for a regulator to say we're not really going  
9 to worry ourselves whether we adversely affect you or  
10 whether we even further the purposes of the statute. That's  
11 just garden variety --

12 JUDGE SRINIVASAN: So on that part of it --

13 MR. SCALIA: -- arbitrary and capricious.

14 JUDGE SRINIVASAN: -- for the purposes of the  
15 statute, I guess as I understood what is going on is to the  
16 extent that your argument is the designation occasions  
17 consequences that are adverse to the company, Congress  
18 viewed designation to be part of a cure. And it just seems  
19 a bit odd to say that the cure that Congress deemed  
20 warranted actually occasions the harm that Congress was  
21 trying to avert.

22 MR. SCALIA: It would be --

23 JUDGE SRINIVASAN: Because Congress already  
24 decided what should happen. It might have been wrong or it  
25 might have been short sided, but from the agency's

1 perspective, isn't the agency stuck with what Congress says  
2 should happen in these circumstances?

3 MR. SCALIA: Well Your Honor, suppose I'm right,  
4 suppose I'm right.

5 JUDGE SRINIVASAN: Yes.

6 MR. SCALIA: And in an even more severe case where  
7 designation will indeed cause deep financial distress, cause  
8 failure, radiate out and adversely affect the economy.  
9 Would Congress have wanted the Council to consider that?  
10 Absolutely. But their answer was it's none of our business.  
11 It's none of our business to concern ourselves with the  
12 impact of ration, which is wrong.

13 A related point, one of the reasons you look at  
14 impact and you look at cost is in order to consider better  
15 alternatives. And we've got the same kind of answer on  
16 alternatives and this was just a couple of sentences and you  
17 might ask me where and I might have to look and I apologize,  
18 but it's hard to find, to suffice it to say.

19 I mean this is again, just heartland State Farm.  
20 You consider the impacts to assess where their alternatives  
21 are superior and one of MetLife's repeated points to FSOC  
22 was for asset managers who manage trillions more in assets,  
23 five trillion, three trillion, we said you're taking this  
24 activities based approach, we'd ask that you take this  
25 activities based approach for us and in fact initially FSOC

1 had been looking at company by company designation for asset  
2 managers. But now it's shifted toward activities based  
3 approach and MetLife said we'd like the same. And FSOC just  
4 said well we're not going to consider that for you because  
5 we're not considering that for you. That was the their  
6 response, which is just heartland arbitrary and capricious,  
7 that sprang in turn from a process where the same people who  
8 had investigated and were now prosecuting the case against  
9 us, were also involved in adjudicating it. Which in turn  
10 manifested itself and I think there were some --

11 JUDGE RANDOLPH: Were they involved in the  
12 formulation of the regulations and the guidance too?

13 MR. SCALIA: They were. This staff --

14 JUDGE RANDOLPH: Is that argument a due process  
15 argument or a separation of power?

16 MR. SCALIA: It's both, Your Honor. The cases  
17 tend to focus a bit more on due process.

18 JUDGE RANDOLPH: I noticed that the government, or  
19 not the government, the Council invokes a state court  
20 decision of the Supreme Court of the United States, the  
21 Withrow (phonetic sp.) case, which I take it has nothing to  
22 do with the separation of powers.

23 MR. SCALIA: That's correct, Your Honor. And  
24 there are other important differences from Withrow. All  
25 Withrow said was you look at whether there's a risk of bias

1 and some mixing and blending by itself isn't enough. But we  
2 have more here. We have the fact that the record was  
3 withheld from MetLife. So there was secret evidence that we  
4 didn't even get to see until we were --

5 JUDGE MILLETT: I just want to ask one predicate  
6 question. That sure sounds like a due process argument that  
7 you're making now, not a separation of powers one. What is  
8 the protected property interest?

9 MR. SCALIA: Well and Judge Millett, they argue  
10 there's not. It's many fold. MetLife has paid millions in  
11 assessments to the government as a designated entity that's  
12 required, I believe it's under Section 5330. As I  
13 mentioned, it immediately became subject to fed supervision.  
14 There were about a dozen federal bank examiners on its  
15 premises for months or maybe a year after it got designated.  
16 That is obviously a direct constitutional interest. To me,  
17 it's remarkable that the government would have told you that  
18 we had no constitutional interest in avoiding paying  
19 millions in assessments, in avoiding being subject to  
20 federal supervision, in avoiding having bank examiners on  
21 its property.

22 But again that comes to how cavalier FSOC was  
23 towards the consequences of what it was doing to this great  
24 American company. They also withheld from us their own  
25 precedence.

1           They would not give us the approved designation  
2 decision or the AIG decision, even though obviously we would  
3 have wanted to pour over those to see how we could better  
4 frame our arguments and yet when it came to litigation in  
5 the District Court they very quickly provided their decision  
6 against us to their emike (phonetic sp.) so their emike  
7 could file briefs. That's not fair and it reflects this  
8 prejudice, this lack of balance that was an out grove of the  
9 kinds of concerns that Withrow recognized are indeed very  
10 substantial.

11           JUDGE WILKINS: You're separation of powers  
12 argument I understand that there's statutory requirements  
13 that were imposed upon you once there was designation.  
14 Those weren't imposed by the Council. Did the Council  
15 impose any regulations on you through its designation  
16 distinct from what the statute already put in place?

17           MR. SCALIA: What the Council did, Your Honor, is  
18 triggered duties and burdens that occur as a matter of law  
19 through designation.

20           JUDGE MILLETT: Congress said when they made a  
21 designation --

22           MR. SCALIA: These things follow and indeed they  
23 did.

24           JUDGE MILLETT: -- these things will happen. But  
25 the things that followed were imposed by Congress?

1           MR. SCALIA: But they were direct impacts on  
2 MetLife that certainly implicated its constitutional  
3 interest in not having to pay assessments and not having to  
4 yield some of its property to a bevy of bank examiners and  
5 the like.

6           So talking about due process and simply my point  
7 there is that Withrow talks about something more than just  
8 this mix, and we certainly had something more in this case.

9           Unless there are any further questions, I just  
10 would like to emphasize again, we're in the heartland of  
11 State Farm, arbitrary and capricious review. You've heard  
12 from Mr. Stern that these are challenging decisions to make.  
13 All the more reason to call upon existing federal rules  
14 which would have informed what they were doing, like rules  
15 about collateral.

16           All the more reason to give weight to the  
17 insurance expertise that Congress put on this body. FSOC  
18 cannot disregard the insurance expertise that Congress put  
19 on this body and then turn around and claim deference to  
20 judgments it made that were primarily about the insurance  
21 industry.

22           Finally, what FSOC did was conducted this  
23 assessment in a manner that was not even handed so that  
24 measures that ordinarily are protective and are recognized  
25 as such both by the federal government and the states, was

1 suddenly turned into risk factors, including when the states  
2 intervene or when MetLife exercised its deferral authority.

3 JUDGE MILLETT: And is --

4 MR. SCALIA: For all these --

5 JUDGE MILLETT: I'm sorry.

6 MR. SCALIA: Yes?

7 JUDGE MILLETT: Just to clarify one thing going  
8 out of here. For all the reasons you've given do you say  
9 that they all are both Chevron Step 1 reading the statute in  
10 a way that you would say is reasonable and workable or is  
11 this all your State Farm Chevron Step 2 and it's just a  
12 failure of appropriate analysis?

13 MR. SCALIA: Virtually all State Farm Chevron Step  
14 2, Your Honor. We are not here making a tall claim that no  
15 insurance companies can be designated. We're simply saying  
16 that in this case, they made some very rudimentary errors  
17 that time again this Court have recognized would result in  
18 vacating and importantly under the National Fuel Gas Supply  
19 decision of this Court, the failure of any part of their  
20 analysis is sufficient to doing the whole because they said  
21 they were relying on all parts and not resting on different  
22 components alternatively. Thank you.

23 JUDGE SRINIVASAN: Thank you. Mr. Stern, we'll  
24 give you back three minutes to start.

25 ORAL REBUTTAL OF MARK B. STERN, ESQ.

1 ON BEHALF OF THE APPELLANTS

2 MR. STERN: Thank you, Your Honor. There are a  
3 lot of things said, a lot of those are addressed point by  
4 point in our reply brief, sort of and probably in more  
5 detail than I could hope to accomplish now. The --

6 JUDGE RANDOLPH: Your reply brief doesn't deal  
7 with the, I mentioned to Mr. Scalia the academic experts  
8 amicus brief, you reply brief doesn't deal with that at all,  
9 does it?

10 MR. STERN: I'm sorry, Your Honor, was this the  
11 point about the requirement to take the cost benefit?

12 JUDGE RANDOLPH: Well it's also that risk  
13 regulation necessarily involves an evaluation of the  
14 likelihood of the risk occurring.

15 MR. STERN: Your Honor, that's not what the risk  
16 is.

17 JUDGE RANDOLPH: And there are ample authorities,  
18 they cite Federal Reserve rules, they cite other agency  
19 rules that take that into account.

20 MR. STERN: I mean, Your Honor, nobody thinks that  
21 all the 30 banks that are subject to Federal Reserve  
22 regulation under Dodd-Frank are all likely to fail. I mean  
23 that's not why we have these regulations.

24 JUDGE RANDOLPH: That's not the question. The  
25 question is whether they can take I not account he

1 likelihood of failure?

2 MR. STERN: Your Honor, that's whether they could  
3 take into account or whether they needed to take it into  
4 account. And again if you look at AIG which is really you  
5 know I think sort of the quintessential example of what  
6 Congress had in mind was it recognized that there were  
7 institutions that dealt heavily in the capital markets that  
8 nobody had predicted were --

9 JUDGE RANDOLPH: I know now you made that  
10 argument. But the reason I said could is because I  
11 understood your opening argument to mean or to say that it  
12 was impossible to do any kind of predictive judgment.

13 MR. STERN: I do think that it's very, very hard.

14 JUDGE RANDOLPH: Did the Council ever say that?

15 MR. STERN: Yes. I mean the Council does --

16 JUDGE RANDOLPH: That it was impossible?

17 MR. STERN: -- talk about that and it talks about  
18 2008 and it cites all of, I mean and it explains the  
19 background of this and says that once a financial crisis  
20 develops how it's going to proceed is extremely difficult to  
21 predict. And what the Council did was not to say this for  
22 sure will happen one way or the other, I mean nobody can do  
23 that. Like what it said is these are the ways in which it  
24 could happen and this is an institution that you know we  
25 can, like there's a dispute about whether there is 183

1 billion dollars of exposure. MetLife says no that's 90  
2 billion dollars of exposure because there would be recovery  
3 regs to which the Council said look we're not saying that  
4 there's going to be 183 billion dollars of losses on the  
5 part of your counterparties.

6           What we're saying is this is a measure of how  
7 large and interconnected you are and if you think that 90  
8 billion dollars of losses is the right figure, that's an  
9 extraordinarily high figure. I mean it's hard to know who  
10 other than, I mean MetLife is the quintessential example of  
11 what Congress would have had in mind when it asked Dodd-  
12 Frank. I mean, you know this is it.

13           JUDGE MILLETT: Can you address some of their  
14 concerns about at least an exposure of transmission channel  
15 and that part of the analysis, the lack of, as they said,  
16 concrete analysis of what the impact is going to be on other  
17 companies. Such as using stress tests or such as using what  
18 they called CCAR testing, those types of things. There  
19 wasn't much, it was sort of, it's very big and it reaches  
20 into an awful lot of industries with an awful lot of money  
21 on the line and so therefore it's going to satisfy the  
22 exposure channel without anything more concrete?

23           MR. STERN: No, I think, I mean the Council's  
24 discussion is a whole lot more specific than that. I mean,  
25 you know, I know the length of the decision alone doesn't

1 tell you whether it's a good and comprehensive decision.  
2 But you know, I've actually read through his 341 pages a few  
3 times, and it's got, it is really --

4 JUDGE MILLETT: Yes, but when you get to the  
5 exposure channel pages which I've also read, there isn't a  
6 lot of concreteness there about the impact. It seems to be  
7 a determination, maybe this is defensible or not that's what  
8 I'm asking you that, look this is so big, so much money and  
9 they are exposure sort of tentacles reach in so many  
10 different, so deep and so far in so many places with so much  
11 money that we just conclude that there is bound to be the  
12 type of impact that would cause severe financial distress --

13 MR. STERN: Well they could cause it.

14 JUDGE MILLETT: -- on the economy. Is that what  
15 they need to do or do they need to, they make a reasonable  
16 enough sounding argument that you can't just say we're  
17 really big and we're in a lot of areas. You really have to  
18 look at how it's going to impact the companies and when you  
19 look at the companies by companies that they're interacting  
20 with, they can withstand it.

21 MR. STERN: Well, but the issue isn't whether any  
22 one company would go under. I mean we discuss in our reply  
23 brief that the problem with AIG was not as we know that its  
24 specific counterparties were going to necessarily fail if  
25 AIG went under. It was the extent to which AIG was going to

1 contribute to and the failure of AIG, was going to  
2 contribute to a really scary economic situation and you  
3 don't have to.

4           JUDGE MILLETT: But you've already begged into the  
5 question you're asking in the first place, a pretty scary  
6 economic situation and that is that everybody in the economy  
7 is facing a severe downturn and that MetLife, a company of  
8 that size is on the brink of insolvency. So I don't think  
9 taking that assumption and then trying to analyze its  
10 consequences, in analyzing those consequence, you're not  
11 specific enough when you say well, it's really, really a bad  
12 situation here so we assume bad things are going to happen.

13           MR. STERN: Well I mean I just, I'd prefer the  
14 Court to, I mean we give a lot of cites, particularly in our  
15 reply brief and I mean in the end the determination has to  
16 speak for itself. And we think that the determination goes  
17 into, doesn't just say you're in a lot of places, you've got  
18 tentacles. It describes in detail the kinds of  
19 transactions, the securities lending program, the guaranteed  
20 investment contracts, multiple other financial instruments  
21 in the capital markets. It talks about who the  
22 counterparties are. I mean it sort of walks through --

23           JUDGE SRINIVASAN: So what about the testing that  
24 they point out could have been done but wasn't done. Is  
25 your response to that kind of testing including the stress

1 test, is your response to that that it would have been  
2 counterproductive to do it and there was a problem or is it  
3 just that we could have done it and maybe it would have been  
4 illuminating but we just didn't have to?

5 MR. STERN: Well I mean I think, there are a  
6 couple of answers. We note in our reply brief that the  
7 Council did conduct some tests that are sort of analogous,  
8 the stress tests. But again the point of the stress test is  
9 to predict just like are you going, I mean it's sort of  
10 takes us full circle. I mean the point of the stress test  
11 is are you going to fail. And that's not the inquiry.

12 JUDGE SRINIVASAN: No, I thought the point of the  
13 stress test was to assess what happens in the event that the  
14 failure comes about. Doesn't it go to the way that the  
15 institution reacts in that situation also?

16 MR. STERN: Well, I think there are two different  
17 arguments that were being made. One is that the Council  
18 should have conducted a stress test and the other is that  
19 there were stress tests done on banks and that the banks  
20 wouldn't, and that even banks that did a lot of business  
21 with MetLife weren't, weren't failing the stress test. And  
22 again the point is not whether any one institution would  
23 fail, and under that theory what you would have, is since  
24 only one bank in the June stress test came away with  
25 anything less than a total clean bill of health. What

1 that's telling you is, is essentially MetLife is that the  
2 Council couldn't designate anybody, you know, and you know  
3 it's sort of an apples and oranges kind of question. We  
4 aren't looking to see whether a particular bank would go  
5 under. What we're looking at is sort of a whole series of  
6 events with lots of different counterparties, lots of third  
7 parties and you know MetLife sort of poo-pooes (phonetic sp.)  
8 the impact on third parties. But that's absolutely crucial  
9 because as the Council explained those third parties don't  
10 necessarily know the risk, the exposure of MetLife's own  
11 counterparties. You've got a freezing up sort of the entire  
12 flow once things start to go downhill. And again it's  
13 just --

14 JUDGE MILLETT: It starts to sound like the asset  
15 liquidation channel is driving everything here. That all  
16 this analysis of what they have, what they're going to do,  
17 how much they're going to have to call in, who is going to  
18 call in other things on them. All of that analysis seems to  
19 make it essentially foreclose, it's hard to imagine how  
20 anything could ever when it has, when it satisfies the asset  
21 liquidation factor isn't going to necessarily satisfy the  
22 exposure transmission channel because, golly gee, there's  
23 really nothing more to look at because we've just found that  
24 they have a lot of, a huge amount of money, a lot of  
25 exposure. It just doesn't seem like that has any rigor to

1 that.

2 MR. STERN: I mean I've got to think that through,  
3 Judge Millett. But whether or not that's true, I don't  
4 think there's anything sort of --

5 JUDGE MILLETT: Well they have to file, I mean  
6 according to the Council they have to meet both prongs of  
7 that test.

8 MR. STERN: No, I don't think that's true.

9 JUDGE MILLETT: As it would --

10 MR. STERN: No that's not right.

11 JUDGE MILLETT: Well, at least they're telling us  
12 they relied on determinations --

13 MR. STERN: No, no, they were --

14 JUDGE MILLETT: -- under both prongs.

15 MR. STERN: Right. But I mean if you look, I mean  
16 if in the end one looks at this and goes gee, the exposure  
17 channel really is most informative in that it tells me about  
18 the problem of asset liquidation. And let's just assume  
19 that that was a conclusion. There is nothing wrong with  
20 that. You know, the question is did MetLife apply factors  
21 in the statute to make the determination? It did respond to  
22 sort of the various sort of pieces of information, you know,  
23 that were put forth. I'd like to say that in terms of cost  
24 benefit analysis which the theory of the cost benefit keeps  
25 changing a little bit, is it a cost, is that a cost benefit

1 to MetLife or is it a cost benefit to the overall sort of  
2 point of the statute --

3 JUDGE RANDOLPH: Did that executive order apply to  
4 this case?

5 MR. STERN: I don't know the answer, Your Honor,  
6 but if it's an executive order, I mean I'm familiar with the  
7 executive order that applies to regulations. This isn't, I  
8 mean this determination is not a regulation, so I don't know  
9 if --

10 JUDGE RANDOLPH: Well the guidance is in a way and  
11 one wonders whether the guidance was in compliance with the  
12 executive order and should be construed that way.

13 MR. STERN: I mean the guidance is specifically not  
14 a regulation. I mean it makes that very clear. So I don't  
15 think that the executive order by its terms would apply.

16 JUDGE RANDOLPH: The regulation is an  
17 interpretation of the statute. The guidance is an  
18 interpretation of the regulation and the decision here is an  
19 interpretation of the guidance.

20 MR. STERN: I don't think that actually the  
21 guidance is an interpretation of the regulation. I mean  
22 it's really just explaining how the Council is going to  
23 proceed. It makes very clear that it's not adding anything  
24 to the statute and nor of course is it taking away anything  
25 from the statute. And the arguments about the impact, what

1 the Council itself said in the pages that were being cited  
2 is look we, like the process of the Federal Reserves like  
3 prudential regulations and what they're going to say and by  
4 the way, they haven't established what the capital  
5 requirements may be. And they're supposed to by statute  
6 tailor these requirements for insurance companies. This is  
7 all sort of out there and it's the Federal Reserve Board  
8 that does this, it's not the Council.

9 JUDGE MILLETT: And will that be subject to  
10 challenge once it's issued?

11 MR. STERN: Absolutely Your Honor. I mean they're  
12 regulations. I mean what the Council simply said is look  
13 our job in this is to make a determination. Federal Reserve  
14 regulations if they are in fact counterproductive, because  
15 the statute, look, is quite clear, you're not supposed to be  
16 counterproductive. If the Federal Reserve regulations were  
17 and I'm not obviously suggesting that they are or will be,  
18 but if they were, they would certainly be subject to  
19 challenge.

20 JUDGE SRINIVASAN: Okay.

21 MR. STERN: Thank you very much.

22 JUDGE SRINIVASAN: Thank you, counsel. The case  
23 is submitted.

24 (Whereupon, at 10:36 a.m., the proceedings were  
25 concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



\_\_\_\_\_  
Diane Wilson

October 28, 2016  
Date

DEPOSITION SERVICES, INC.