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Financial Reform Newsletter: April 27, 2017
Better Markets' Presentation to the Treasury Department on the President's Executive Order; MetLife's Latest Gambit to Avoid Financial Protection Rules: If You Can't Win in Court, Try to Get Political Allies to Save a Losing Case; The Wells Fargo Scandal is Far From Over

Better Markets' Presentation to the Treasury Department on the President's Executive Order

Emphasizing the important role the Financial Stability Oversight Council (FSOC) plays in preventing destabilizing financial surprises resulting in massive taxpayer-funded bailouts, Better Markets participated in and presented its thoughts at a Treasury Department roundtable meeting on the President's February 3rd Executive Order on Core Principles for Regulating the U.S. Financial System.

The roundtable was one in a series of meetings held to gather information in connection with Treasury Secretary Mnuchin's review of financial regulations. To that end, Better Markets focused on the FSOC's unique role as the only entity in the U.S. government with the power, authority and duty to look for emerging systemic risks to the financial system regardless of where they come from. Given that the many financial regulatory agencies had siloed tunnel vision before the 2008 crash, this is a vital mission. The FSOC is also the only entity in the U.S. government with the power, authority and duty to identify, review and designate for increased regulation systemically significant nonbanks.

Better Markets reviewed the history of disastrous financial surprises in 2008 that caught regulators, policy makers and elected officials unprepared to deal with the crash. This included the well-known disasters and bailouts of AIG (almost $185 billion) and money market funds ($3.7 trillion), but also included a discussion of Morgan Stanley and Goldman Sachs, both of which were failing just five days after the bankruptcy of Lehman Brothers. In fact, without government intervention and bailouts, neither were likely to be able to open for business on Monday, September 22, 2008, when according to an email, Goldman Sachs would be "toast."

Avoiding these catastrophic financial surprises is why, as pointed out by Better Markets' President and CEO, creating an entity like the FSOC had bipartisan and industry support, including President Bush's Treasury Secretary Hank Paulson, the Financial Services Roundtable, Investment Company Institute, SIFMA and the American Banking Association.

In addition to its creation and existence being critically important, the FSOC has also been a deliberative, measured and modest regulatory agency. As Better Markets pointed out, the FSOC cannot be fairly characterized as "designation crazy," having only designated five nonbanks in more than six years. (One of the five has been de-designated because it eliminated the systemic risk that it posed to the U.S. financial system.) Given the numerous nonbanks that had to be bailed out by the government and taxpayers in 2008-2009, this is a very restrained record. In fact, one could make a good case that the FSOC has been too restrained in using its designation authority and that the American taxpayers are still too exposed to insufficiently regulated systemically significant nonbanks.

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None of this is to say that FSOC is perfect or has done everything right. Better Markets has, at times, been a very harsh critic of FSOC over the years. But FSOC and its mission are incredibly important and, if someone doesn't perform its role or makes unwise changes, then the likelihood of another, and much worse crash and much bigger bailouts is virtually guaranteed.

While everyone who attended the roundtable at Treasury might not agree on all things, there's no doubt that they agree on these core principles: the need to end too big to fail; the need to ensure that American taxpayers never again have to bail out financial firms; and ensuring the country never again suffers as it did during and in the aftermath of the 2008 crash. FSOC's mission is key to all of that.

MetLife's Latest Gambit to Avoid Financial Protection Rules: If You Can't Win in Court, Try to Get Political Allies to Save a Losing Case.

In what can only be described as a carefully choreographed dance between the Trump Administration and Wall Street's lawyers and lobbyists, on Monday, MetLife filed a motion to stay the appeal in its lawsuit against the FSOC as it sought to avoid a reckoning in the D. C. Circuit Court of Appeals.

In reality, this latest maneuver is a political ploy designed to short circuit the judicial process and to avoid MetLife's regulation as systemically significant threat to the financial stability of the United States.

The FSOC had identified MetLife as a systemically significant nonbank threat to the financial stability of the United States (like the insurance company AIG was in 2008) and designated it for enhanced regulation by the Federal Reserve. [MetLife challenged the designation in federal district court and unfortunately won the first round.] The FSOC appealed, with good reason, since the district court committed several major errors of law, [as we made clear in the brief] we filed.

Apparently lacking confidence in its appeal, MetLife has embarked on a new strategy. First, on Friday, April 21st, President Trump issued a "Memorandum" ordering the Treasury Department to conduct a "thorough review of the FSOC determination and designation process under Section 113" and to report the results within six months.

Remarkably, the President's Memo closely tracks the federal district court opinion and MetLife's legal briefs. The very next business day, on Monday, April 24th, MetLife filed its motion papers, which - surprise -- very closely tracks the language in the Presidential Memo. It then argues that the case should be stayed since the forthcoming report might address the issues on appeal!

Hence, MetLife's briefs and the district court's opinion were conveniently re-packaged into the Presidential Memo; the Memo in turn was re-packaged into the Motion filed by MetLife in the D.C. Circuit. Given the similarity in the language and the timing and sequence of events, one has to wonder if this is a mere coincidence or just more proof that the White House and Wall Street (and its lawyers and lobbyists) have merged into one seamless entity (or maybe into a single swamp creature).

As interesting as this political ploy is, it should be disregarded by the courts for lots of reasons, including that MetLife failed to mention in its stay request that, at best, the President's Memo sets in motion a complex, multi-step, multi-year process with numerous critical decision points, all of which are highly uncertain and all of which argue against granting MetLife's request for a stay.

First, the President's request for a Treasury Department report on FSOC's designation process has no formal or official connection to FSOC whatsoever. FSOC is not the Treasury Department and the Treasury Department is not a party to MetLife's lawsuit. FSOC is a separate legal entity that must itself act in accordance with the law, which is what FSOC did when it designated MetLife.

Second, no matter what the report ultimately says, it cannot alter the record on which the FSOC acted when it designated MetLife, or change the legal character of that designation, or determine whether or not what the FSOC did was lawful and reasonable. Those are issues for the court of appeals to decide.

Third, even if the report prompts the FSOC to reconsider its approach to designation, it must follow the law if it wants to change its rules governing the process. An agency cannot reverse its rules on a whim, a

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political directive, or without a good reason; it if does, it will be overturned in court. Instead, it must follow a series of steps under the law, including notice and comment rulemaking, designed to ensure that the public interest is protected.

The American public deserves to have the appellate court finish what MetLife started. A lawsuit should not be stayed because one party now has a political ally in the White House and is looking for a political shortcut to evade a dubious case in the courts.

The Wells Fargo Scandal is Far From Over

The Wells Fargo Board of Directors may have dodged a bullet being narrowly re-elected at the company's annual meeting, but no one should think that this changes much. The report they issued on the years-long illegal practice of ripping off customers was a whitewash. The Board's defense that it had no idea what was going on at the bank for more than 15 years is no defense. The Board and CEO were, at best, derelict in their duties and should go.

The virtually unprecedented narrow margins the Board members received (all but three directors failed to break 80%) should be seen for what it is: shareholder condemnation of grossly deficient Board members. Stephen Sanger, Chairman of the Board of Directors received just 56% approval. Two other directors who chair board committees related to risk, finance, and corporate responsibility received 54% and 53%. When one considers that the typical director is re-elected with 95% of the vote, this is a pretty damning indictment. In the context of director elections, Wells Fargo's directors received a D- grade from their owners.

The realities of the Wells Fargo scandal have not changed. The scope and scale of the illegal activities at Wells Fargo were staggering, spanning a period of more than 15 years and involving thousands of employees at hundreds of locations. The bank's CEO, CFO and Board of Directors claim that they were ignorant of all this and didn't see 15 years of big, billowing red flags simply is not credible.

If anyone thinks for one minute that CEO Sloan or the Board shouldn't be shown the door, read this Fact Sheet detailing:

- The Whitewash and Cover Up
- CEO Sloan's Claims to Know Nothing Aren't Credible
- CEO Sloan's Involvement in the Cover Up
- The Board of Directors' Dereliction of Duty

Keeping the same executives and Board members means that the Department of Justice and the SEC must accelerate their investigations to protect the bank's customers and the public from the threat posed by this deficient management at of one of the country's largest too-big-to-fail banks.

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