

**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, INC., FOR LEAVE
TO FILE A BRIEF AS AMICUS CURIAE IN OPPOSITION TO
METLIFE’S MOTION TO HOLD APPEAL IN ABEYANCE**

Better Markets, Inc. (“Better Markets”) respectfully moves this Court for leave to file the accompanying amicus curiae brief in opposition to MetLife’s eleventh hour motion seeking to hold this important appeal in abeyance (“Motion”), pursuant to Federal Rule of Civil Procedure 29 and D.C. Circuit Rule 29.¹ This

¹ Better Markets represents that it contacted counsel for all parties to seek their consent to this motion. Counsel for MetLife declined to give consent, and counsel for the Department of Justice was not able to convey its position to Better Markets as of the time of filing.

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

(1) Because there is a breakdown in the adversary process in this case, the need for additional argument on the issues presented in the Motion is essential. Otherwise, this Court will not have material information necessary to evaluate and decide the Motion. Specifically, FSOC, represented by the Department of Justice, which also represents the President and the Treasury Department, has not presented the Court with material facts bearing on the Motion, has declined to oppose the Motion, and has, instead, consented to a stay of at least one-third of the time requested by MetLife. Consequently, FSOC's position is not receiving the vigorous, independent, unconflicted representation that it deserves, thereby depriving this Court of the benefit of a functioning adversary system upon which the administration of justice relies.

(2) The proposed brief submitted herewith addresses matters and facts that are directly relevant to the disposition of the Motion, but found nowhere in either party's submission, and the brief will assist the Court in resolving the Motion.

(3) Better Markets has a strong interest in this case, which is of extraordinary importance.

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

ARGUMENT

I. Better Markets' participation as an amicus is especially important because of FSOC's lack of opposition.

The need for additional argument on the issues presented in the Motion is especially acute because FSOC has declined to oppose the Motion. Courts recognize the need to supplement the advocacy from the parties where their litigation positions are aligned. 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).

This is such a case. In its short Response, FSOC merely states that it “requests additional time for deliberation among the Council's members” and does not “take a position at this time on MetLife's motion” Instead, FSOC consents to a 60-day abeyance,” at which time it proposes to file a status report. Response at 2.

Instead of capitulating to the Motion, even in part, FSOC should be vigorously opposing it, to defend its designation of MetLife as a threat to the financial stability of the United States and to bring this case to the most expeditious resolution possible. Better Markets' brief will help fill the adversarial void created by FSOC's response.

II. Better Markets offers material facts and helpful arguments to the Court found nowhere in the parties' submissions.

Leave to file an amicus brief is to be freely given 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.*, 339 F.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) (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).

The Motion seeks to place this case on hold for at least 6 months, while a separate review of FSOC’s designation process ordered by President Trump is conducted by a nonparty to the case, where the results of the review are highly uncertain and where its impact on this litigation will be tenuous at best. Better Markets’ brief demonstrates that the Motion fails to satisfy the standards governing motions for an abeyance, because (1) the review process ordered by the President is nothing like the much more immediate, concrete, and potentially consequential “proceedings” that can sometimes justify an abeyance, and (2) granting the Motion

and thus delaying the case for a substantial period of time would harm the public interest.

First, the outcome of the political review process ordered by President Trump is highly uncertain. And even if the report recommends changes to FSOC's designation process, whether, when, and how those recommendations are even considered, much less adopted, by FSOC is also highly uncertain. The report due in 180 days will have no power by itself to alter the designation process or the resolution of this case. Neither the President, the Treasury Secretary, nor the report itself can change the record on which the FSOC based its decision to designate MetLife, the record on which the district court based its decision to vacate the designation, the law that the district court applied, or even the posture that the FSOC maintains in this appeal, as neither the Treasury Secretary nor the President are parties to this case. To alter its stance in this appeal, or to change its rules or guidance relating to the designation process, the FSOC's ten voting members, acting as a separate and distinct entity created by law, would have to take affirmative action in accordance with its charter and procedures.

Second, holding the case in abeyance would materially harm the public interest, as it would delay the resolution of one of the most important cases confronting any court in the modern era of financial regulation, potentially extending indefinitely the public's exposure to the systemic risks posed by MetLife and

prolonging the crippling effects of the lower court's decision on the ability of the FSOC to exercise its designation authority when necessary now or in the future.

All of Better Markets' arguments are relevant to this case and will be helpful to the Court.

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

Better Markets, Inc. ("Better Markets") is an independent, nonpartisan, nonprofit organization that promotes the public interest in the financial markets. It was founded in the wake of the 2008 crash—the worst financial crash since the Great Depression—to support the reform of our financial regulatory framework so that systemically dangerous financial firms, banks and nonbanks alike, would never again bring our economy to the brink of collapse. Focusing extensively on the rulemakings required by the Dodd-Frank Act, Better Markets has participated in more than 200 rulemakings and filed more than 200 comment letters to the FSOC, CFTC, SEC, Federal Reserve and other financial regulators, advocating for swift and strong implementation of reforms in the securities, commodities, and lending markets. This advocacy promotes transparency, accountability, and oversight in the financial markets so that they remain sufficiently strong and stable to serve the real economy without precipitating another crisis.

Better Markets has a strong interest in defending financial reform in general and has been a leading advocate for promoting and protecting the FSOC and its

authority. Better Markets filed an amicus brief in support of the FSOC in this appeal, and in the district court below. *See, e.g.,* Brief of *Amicus Curiae* of Better Markets, Inc. in Support of the Defendant-Appellant, No. 16-5086 (D.C. Cir. filed June 23, 2016). Better Markets has exhaustively studied the enormous costs of the 2008 crisis, which destroyed tens of millions of jobs, triggered a tidal wave of home foreclosures, caused untold human suffering, and obliterated at least \$20 trillion in gross domestic product. *See* BETTER MARKETS, THE COST OF THE CRISIS: \$20 TRILLION AND COUNTING (2015), *available at* www.bettermarkets.com/costofthecrisis. Better Markets has also highlighted the critical role of the FSOC's designation 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 the FSOC's designation authority to preventing financial crises.³ Better Markets has repeatedly highlighted the need to shield the American economy from unreasonable risks posed by the largest, most complex, highly leveraged, and extremely interconnected

³ *See FSOC Accountability: Nonbank Designations: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs, 114th Cong. (2015)* (statement of Dennis M. Kelleher, President and CEO, Better Markets), *available at* http://www.bettermarkets.com/sites/default/files/documents/Kelleher%20Testimony%203-25-15_1.pdf

nonbank financial institutions.⁴ Another interest of Better Markets in this appeal concerns the obligations of regulatory agencies under their organic statutes and under the Administrative Procedure Act, which Better Markets regularly analyzes, having defended rules of the SEC and CFTC multiple times in court. Many of those submissions focused on the scope of an agency's obligation to conduct economic analysis, a theme of MetLife's arguments on the merits in this case.⁵

MetLife's motion to hold this appeal in abeyance undermines Better Markets' interests. If granted, a stay will delay the resolution of this case for a significant period of time, potentially indefinitely. Allowing the lower court decision to remain intact and uncorrected poses several serious threats. First, MetLife, one of the largest, most complex, and most interconnected financial firms in the U.S., will

⁴ See Comment Letters from Better Markets to the FSOC on Authority to Designate Financial Markets Utilities as Systemically Important (Jan. 20, 2011 and May 27, 2011); Comment Letter from Better Markets to the FSOC on Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies (Dec. 19, 2011), collected comment letters *available at* http://www.bettermarkets.com/sites/default/files/FSOC_Comment_Letters.pdf.

⁵ 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, 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).

remain free of federal prudential regulation, contrary to the judgment of the nation’s leading regulatory authorities, as set forth in their 341-page final determination. Second, if left intact, the district court’s decision will also critically impair the FSOC’s ability to exercise its designation authority in the future, as the decision erects hurdles that make the FSOC’s already daunting task nearly impossible. Finally, and even more broadly, the decision threatens to impose unjustifiable burdens on all agencies: If every statute with the word “appropriate” now requires its administering agency to conduct cost-benefit analysis before acting, the entire process of regulating our financial markets will suffer terrible setbacks, slowing the rulemaking process and making every rule an easier target for litigation challenge.

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: May 8, 2017

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CORPORATE DISCLOSURE STATEMENT

Better Markets, Inc. (“Better Markets”) is an independent, nonpartisan, nonprofit organization that promotes the public interest in the financial markets. Better Markets has no parent corporation and there is no publicly held corporation that owns 10% or more of the stock of Better Markets.

Dated: May 8, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2017, I caused the foregoing motion to be filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties and amici are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: May 8, 2017

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