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Metropolitan Life And The Shadow Banking Controversy: Non-Bank Investment Alternatives To Traditional Banking

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METROPOLITAN LIFE AND THE SHADOW BANKING CONTROVERSY: NON-BANK INVESTMENT ALTERNATIVES TO TRADITIONAL BANKING

by

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INTRODUCTION

"Shadow banking" has a great variety of definitions. The term was originally coined in 2007 by Paul A. McCulley, who attended the Kansas City Federal Reserve Bank annual symposium in Jackson Hole, Wyoming. The meeting discussed the financial crisis then occurring nationally and globally. It focused on systemic risk and, in particular, what the author

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dubbed the “shadow banking system” which he noted was “the whole alphabet soup of levered-up non-bank investment conduits, vehicles, and structures.”[1]

In a series of Staff Reports issued by the Federal Reserve Bank of New York, the authors defined “shadow banks” as “financial intermediaries that provide maturity, credit, and liquidity transformation without explicit access to central bank liquidity or public service credit guarantees.”[2] Two of these staff authors in a later report defined the term as “a web of specialized financial institutions that channel funding from savers to investors through a range of securitization and secured funding techniques.”[3] A comparable variety of definitions: “The system of non-deposit taking financial intermediaries including investment banks, hedge funds, monoline insurance firms and other securities operators”;[4] “all financial activities, except traditional banking, which require a private or public backstop to operate.”[5] “The financial intermediaries involved in facilitating the creation of credit across the global financial system, but whose members are not subject to regulatory oversight. The shadow banking system also refers to unregulated activities by regulated institutions.”[6]

This article will examine the present controversy between the Financial Stability Oversight Council (FSOC) and the Metropolitan Life Insurance Company (MetLife) concerning the council’s final determination concerning the need for the council to oversee MetLife’s shadow banking activities and the company’s continuing efforts to contest the rights of the Council to regulate the company’s activities. The article will conclude that regulation is indeed necessary in light of comparable international regulation and the financial ramifications of the company's activities.

THE METROPOLITAN LIFE CONTROVERSY

The Dodd-Frank Act Empowerment of the Council

The FSOC was established pursuant to §111 of the Dodd-Frank Act. The Council's Board of Governors, among other matters, identifies risks to U.S. financial stability, promotes market discipline, and responds to threats to the stability of the U.S. financial system.[7] With respect to nonbank financial institutions, the Act requires supervision "for nonbank companies that may pose risks to the financial stability of the United States in the event of their material financial distress or failure"….[8] The Board of Governors may make recommendations for the establishment of heightened prudential standards for risk-based capital and other financial instruments.

Factors that the Council considers in making a determination of whether a U.S. company is to be supervised by the Board of Governors of the Council include (a) the extent of the leverage of the company; (b) the extent and nature of the off-balance-sheet exposures of the company; (c) the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies; (d) the importance of the company as a source of credit for households, businesses, and

State and local governments and as a source of liquidity for the United States financial system; (e) the importance of the company as a source of credit for low-income, minority, or underserved communities, and the impact that the failure of such company would have on the availability of credit in such communities; (f) the extent to which assets are managed rather than owned by the company, and the extent to which ownership of assets under management is diffuse; (g) the nature, scope, size, scale, concentration, interconnectedness, and mix of the activities of the company; (h) the degree to which the company is already regulated by 1 or more primary financial regulatory agencies; (i) the amount and nature of the financial assets of the company; (j) the amount and types of the liabilities of the company, including the degree of reliance on short-term funding; and (k) any other risk-related factors that the Council deems appropriate.[9]

FSOC's MetLife Inc. Final Determination

On December 18, 2014, the Council designated MetLife as a nonbank systemically important financial institution. MetLife is the fourth nonbank to receive the designation as systemically important. The other nonbanks to receive the designation are Prudential Financial, Inc. (September 19, 2013); General Electric Capital Corporation, Inc. (July 8, 2013); and American International Group, Inc. (July 8, 2013).[10] The Council sought to regulate MetLife as it had regulated other corporations in order to encourage financial stability.[11]

Under §102(a) (6) of the Dodd-Frank Act, a company is predominantly engaged in financial activities if (a) the annual gross revenues derived by the company and all of its subsidiaries from activities that are financial in nature…and, if applicable, from the ownership or control of one or more insured depository institutions, represents 85 percent or more of the consolidated annual gross revenues of the company; or (b) the consolidated assets of the company and all of its subsidiaries related to activities that are financial in nature … and, if applicable, related to the ownership or control of one or more insured depository institutions, represents 85 percent or more of the consolidated assets of the company.

With respect to MetLife, the Council issued a lengthy analysis which included over 21,000 pages of the company's submissions. The Council determined that material financial distress at MetLife could pose a threat to the financial stability of the United States. The company, therefore, should be subject to the enhanced prudential standards of FSOC.[12] The Council observed that the Metropolitan Life Insurance Company (MetLife) is a global entity that provides insurance and many other insurance-related and financial products to some 100 million customers to over 50 countries. As of 2014, in fact, it possessed some $902 billion in total assets and that its assets and activities met the 85 percent threshold of Dodd-Frank.

MetLife responded quickly to the determination. In its January 13, 2015 complaint filed in the United States District Court for the District of Columbia, the company sought review of the determination in accord with provisions of the Dodd Frank Wall Street Reform and Consumer Protection Act, the Administrative Procedure Act and the United States

Constitution. The company designated the determination as arbitrary and capricious and not in accord with MetLife's status as an insurance company rather than as a company predominantly engaged in financial activities as defined by the Dodd Frank Act itself and the Bank Holding Company Act. The company noted, furthermore, that the action by FSOC follows the recommendations of the Financial Stability Board (FSB), a mostly European body of bank regulators and central banks in which the U.S. Department of the Treasury and the Federal Reserve are members. The FSB had published an initial list of nine global systematically important insurance companies that are systematically important financial institutions. Its recommendations had no force of law and MetLife had no opportunity to challenge the FSB recommendations.[13]

The seventy-nine page ten-count complaint contended that FSOC's final determination to designate MetLife as a nonbank systemically important financial institution was arbitrary and capricious because, among other matters, (a) the only independent voting member of the Board of Governors with insurance expertise as well as the only nonvoting insurance commissioner on the Council both dissented from the finding; (b) MetLife was denied due process by the rules and obligations under Dodd-Frank, the APA and the due process clause of the Constitution; (c) FSOC made numerous errors that fatally led to FSOC's reasoning in its findings; (d)FSOC failed to give meaningful weight to the existing comprehensive state insurance regulatory regime; (e) MetLife is not predominantly engaged in financial activities as required by statute which of the failure to meet the 85% rule; (f) the FSOC failed to undertake activities-based review for insurance companies; (g) FSOC failed to assess MetLife's vulnerability to material financial distress; (h) FSOC's findings relied upon unsubstantiated speculation and irrational economic predictions[14]; and (i) FSOC failed to examine consequences of its designation decision.

HISTORICAL SETTING OF TRADITIONAL BANKING AS OPPOSED TO SHADOW BANKING

Traditional Banking

Traditional banking has had a checkered history. National banking began at the inception of the New Republic. The First Bank of the United States (1791-1811) operated under the leadership of Alexander Hamilton, who was also the first Secretary of the Treasury under President George Washington. The issuances of bank notes occurred through state banks due to the lack of a national currency. In the seminal case of *McCulloch v. Maryland*,[15] the United States Supreme Court decided that Congress had the right to create a bank under its power to make "all laws which shall be necessary and proper, for carrying into execution" its delegated powers under Article I of the Constitution. In the midst of the Civil War of 1861-1865, Congress enacted the National Banking Act[16] which established standards for banks including minimum capital requirements and the issuance of loans as well as the imposition of a 10 % tax on state banknotes that effectively removed them from circulation.[17]

The Federal Reserve Act of 1913[18] creates the national system of banks that has existed to the present day. It requires all national banks to be members of the Federal Reserve System and to maintain levels of reserve with one of the 12 Federal Reserve banks. State banks are also eligible to become members of the Federal Reserve System with all of the attendant benefits including federal protection of deposit. The "Fed" conducts monetary policy, supervises and regulates banks, protects consumer rights, and provides financial services to the government, financial institutions, and makes loans to commercial banks. The Great Depression that commenced in 1929 and ended with the entry of the U.S. into World War II led to Congressional inquiry concerning the causes of that Depression. The inquiry noted that there were bank panics almost every 20 years. It discovered that among the major causes were the heavy investments in securities by bank affiliates in the 1920s, serious conflicts of interest between banks and their affiliates, speculative investments by banks, and high-risk ventures. Accordingly, the Banking Act of 1933,[19] better known as the Glass-Steagall Act, became the law of the land.

Bank Separation into Classes

Glass-Steagall separated banks into commercial banks and investments banks. Section 20 of the Act forbade a member bank from engaging in the issuance, flotation, underwriting, public sale, distribution, or participation of stocks, bonds, debentures, notes, or other securities. Section 21 forbade firms that engaged in the said forbidden activity from receiving deposits, certificates of deposits, or other evidences of debt. The payment of interest on accounts was restricted by the Act to prevent ruinous competition. As a result bank panics that occurred virtually every other decade did not occur from 1933 until many decades later apparently as a result of the removal of the same separation of banks. The passage of the Riegel-Neal Banking and Branching Efficiency Act of 1994[20] repealed the prohibition of interstate banking by permitting banks to purchase banks in other states or to establish branches therein. The Federal Deposit Insurance Corporation (FDIC) was given jurisdiction over state nonmember banks, the Office of the Comptroller of Currency received jurisdiction over state nonmember banks, and the Federal Reserve Board over state member banks. Applicants for expansion were judged by their compliance with the Community Reinvestment Bank of 1977,[21] which mandated reinvestment by out-of-state banks in the local communities where they were located.

Repeal of Glass-Steagall

In the 1990s U.S. banks complained that they could not compete with foreign, especially Japanese multi-service banks that offered both commercial and investment banking services. The share of total private financial assets held by these banks declined from 60 % to 35 % for the period of 1970-1995. As a result and after four decades of the Glass-Steagall separation without any major run on banks, the Financial Services Modernization Act popularly known as the Gramm-Leach-Bliley Act of 1999 was enacted.[22] The first section of the Act repealed the Glass-Steagall separation of commercial and investment bank. It permitted the creation of a new “financial holding company” whereby the entity may engage in any activity that the Federal Reserve Board determines to be financial in nature or incidental to such activity. It did provide, however, that the activity not pose a substantial risk to the safety or soundness of depositary institutions or to the financial system generally. Banks could now offer services that included insurance and securities underwriting and merchant banking. Before the Glass-Steagall repeal, banks had avoided panics for twice the usual time period; the banking crisis of 2007-2009 raised issues of the soundness of the Glass-Steagall repeal and "too-big-to-fail" bank holdings.

Dodd-Frank and Other Reforms

Whenever a financial crisis looms, it is almost inevitable that governmental regulation is promulgated to solve or prevent re-occurrence. The thousand-page Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[23] was signed into law which contained numerous sub-titles that sought to alleviate many of the ills affecting the financial system. Title VI, known as "Bank and Savings Association Holding Company and Depository Institution Regulatory Improvements Act of 2010," explicitly dealt with bank holding companies created under Gramm-Leach-Bliley. Rather than restore the Glass-Steagall separation of commercial banks from investment banks, the major emphasis of Title VI is that a bank holding company is to be "well-capitalized and well-managed."[24] Section 38(b) of the Federal Deposit Insurance Act[25] defines "well-capitalized" as follows: "An insured depository institution is "well-capitalized" if it exceeds the required minimum level for each relevant capital measure." Dodd-Frank raised the standard of well-capitalized to be where its total risk-based capital ratio is 10 % or greater, a Tier I risk-based capital ratio of 6 % or greater, and a leveraged capital ratio of 5 % or greater.

The Volcker Rule

The already mentioned financial crisis of 2007-2009 led to the closures of hundreds of banks, somewhat reminiscent of the closures of the Great Depression. Government had to come to the rescue of certain banks so that the global financial system would not collapse. Some believed that the crisis was precipitated by the repeal of Glass-Steagall; they pointed to the $6 billion loss by JP Morgan Chase in 2012 with respect to speculative trading in the U.K. The "Volcker Rule", named after the former chairman of the Federal Reserve, Paul Volcker, was promulgated pursuant to Title VI, §619 of Dodd-Frank which added a new §13 to the Bank Holding Company Act. It prohibited an insured depository institution and holding company controlling an insured depository institution from engaging in proprietary trading and further prohibited the sponsoring and investing in hedge funds and private equity funds. The term "proprietary trading" was given a broad definition to include acting as a principal or custodian for an affiliated third party; for a trading account used by the entity to acquire or be financially involved in short-term resale; the prohibition of purchasing, selling, or otherwise acquiring or disposing of stocks, bonds, and other financial instruments for the bank's own account. The Rule became effective on July 21, 2012 but allowed banks two years to comply.[26]

Additional Prohibitions

Section 939(a) of Dodd-Frank amended the Federal Deposit Insurance Act to prohibit a savings and loan association from acquiring or retaining a corporate debt security that does not meet the standards of the FDIC. There were detailed considerations set forth in the Act in making the said determination. With respect to "too-big-to-fail," it was noted that in 2011 five banks possessed some $8.5 trillion in assets (56 % of the U.S. economy).[27] §622 of Dodd-Frank, "Concentration Limits on Large Financial Institutions," amended the Bank Holding Act of 1956 to forbid the merger, consolidation, or acquisition of substantially all assets or otherwise acquire control by financial institutions if the total consolidated liabilities of the acquiring financial company exceeded 10 % of the aggregated consolidated liabilities of all financial companies at the end of the prior calendar year. Exceptions which led to even greater enlargement of banks included acquisition of banks in danger of default.

Section 623 of Dodd-Frank amended the Federal Deposit Insurance Act to require the responsible agency to disapprove an application for an interstate merger transaction if the result of the merger is to permit the insured depository institution to control more than 10 % of the total amount of deposits of the insured depository institutions. Among the practices that caused a threat to the U.S. banking sector were loans on derivative transactions and other high risk loans. The total non-secured loans and extensions of credit made by national banks are restricted by statute not to exceed 15% of their unimpaired capital and unimpaired surplus. The total loans and extensions of credit by a national bank fully secured by readily marketable collateral having a market value, at least at least equal to the amount of the funds outstanding, are not to exceed 10% of the unimpaired capital and unimpaired surplus of the association. Dodd-Frank includes in the definition of "loans and extensions of credit" credit exposure on derivative transactions; repurchase agreements; reverse repurchase agreements; and securities lending and borrowing transactions. State banks are also made subject to the credit exposure limits with respect to derivative transactions. The Act also places limitations on lending to insiders as well as to purchases of assets from them unless the transaction is on market terms, represents more than 10% of the capital stock and surplus of the covered bank, and has been approved by a majority of the board of directors of the institution.

International Initiatives

Additional international regulatory requirements also appeared. The Basel Committee on Banking Supervision, composed of 27 countries and Hong Kong SAR, is a forum that calls for cooperation among member countries on banking supervisory matters.[28] Under the 2004 Basel II Accord, a three-pillar framework was established that included (1) risk-based capital requirements for credit-risk, market risk, and operational risk; (2) supervisory review of capital adequacy; and (3) market discipline through enhanced public disclosures. Basel III entitled “A Global Regulatory Framework for More Resilient Banks and Banking Systems, added technical changes concerning assignment of risk or certain securitization positions.[29] Some of the recommendations of the said Basel Accords concerning the market risk framework were adopted as a Final Rule by Federal Reserve Board together with the Office of the Comptroller of the Currency and the FDIC that required banking organizations with significant trading activities to adjust their capital requirements to better account for the market risks of their activities.[30] The Rule modified the existing market risk capital rule by adjusting the minimum risk-based capital calculation by the use of new measures of creditworthiness. It also: (1) modified the definition of covered positions to include assets that are in the trading book and held with the intent to trade; (2) introduced new requirements for the identification of trading positions and the management of covered positions; and (3) requires banks to have clearly defined policies and procedures for actively managed covered positions, for the prudent evaluation of covered positions, and for specific internal model validation standards.[31]

In summary, bank institutions are now also subject to the many statutory and regulatory provisions promulgated after the financial crisis of 2007-2009. As a result of these restrictions, there was a decided effort by many financial and investment institutions to avoid or bypass these onerous provisions.

Shadow Banking

Shadow banking in essence operates by intermediation, the matching of lenders with savings to borrowers who need money by an agent or third party. The agent or third party had always been a bank, but now non-bank financial institutions practice this intermediation outside of the traditional banking system. This type of intermediation lacks both the protections afforded to traditional or regular banks but also avoids onerous statutory and regulatory obligations. In traditional banking intermediation, banks received deposits from depositors which then are used to fund loans to borrowers. The FDIC, the Federal Reserve's discount window, and other governmental guarantees offer relative financial safety to these deposits. In shadow banking financial intermediation, however, and in particular in credit intermediation, these guarantees are wanting. It was believed that this intermediation was safe because of credit lines and tail-risk insurance in the form of wraps and guarantees that included commercial banks and insurance companies. The forms of funding included securitizations such as mortgages, loans, and receivables that were combined into securities and tranches; and secured lending backed by mortgages and other assets.[32]

Although having a serious downturn during the financial crisis of 2007-2009, it is conservatively estimated that non-bank financial intermediation ("other financial intermediaries" [OFI]) grew to $75 trillion in 2014 having advanced by some $5 trillion from the prior year. OFI assets constituted 24 % of the total global financial assets, half of banking system assets, and 117% of GDP.[33] At the end of 2012, the national jurisdictions hold assets of non-bank financial intermediaries were mainly the U.S. (37%); the Euro area (31%); the U.K. (12%); and China (3%).[34] The Financial Stability Board (FSB)[35] divided the OFI into sub-sectors as follows (a)other investment vehicles composed of "equity funds" ($9 trillion); "fixed-income/bond funds" ($7 trillion); "other funds, i.e., neither equity nor bond funds ($3 trillion); and representing a total of $21 trillion and 35% of OFI assets (b)broker-dealers-$7 trillion or 12& of OFI, mainly concentrated in the United Kingdom (UK), U.S., Japan, Canada, and South Korea; (c) structured finance vehicles - $5 trillion held mainly in the U.S. and the U.K.; (d) finance companies ($4.5 trillion [8%]) and money market funds ($3.8 trillion (6%) mainly in the U.S. and the euro area); (e) hedge funds ($0.1 trillion [0.02%]) but the figure appears to be underestimated due to omission of off-shore holdings; (f) jurisdiction-specific entities including Dutch special financing institutions, U.S. financial holding and funding companies.[36]

RISKS AND REGULATION OF SHADOW BANKING

A central purpose of the Dodd-Frank Act is to prevent systemic risk to the entire financial system by entities that are "to-big-to-fail." The designation clearly aimed at the several banks which controlled a vast percentage of deposits, any of which could bring about the financial collapse of the global financial system without governmental intervention. The question arose whether and to what extent shadow banking poses systemic risks to the financial community both within the U.S. and abroad. The collapse of Lehman Brothers caused the tightening of credit standards and banks became much more risk averse. Risks were then simply transferred from traditional banks to shadow banks which found it profitable to assume the risks that traditional banks were no longer able or desired to pursue. Regulators had paid little attention to shadow banks and, as a result, payday loans, "crowdfunding," securitized products, money-market funds, and repurchase agreements became the province of shadow banking. Firms like Blackstone, Ceberus, and Avenue Capital stepped in to provide the capital for smaller companies.

The problem is that while some commentators such as Bill Winters, formerly of JP Morgan Chase and head of Renshaw Bay, a shadow banking company, believe that the rise of shadow banking is healthy to the economy, others such as Professor Steven Schwarcz of Duke University bemoaned the fact that Dodd-Frank focused on traditional banks and essentially ignored shadow banking. Schwarcz would remove the protection of limited liability of managers of shadow banking firms which creates moral hazard. Manages not having "skin in the game" are more likely to take risks that expose their firms to market failure. Most shadow banking firms are owned and operated by investor-managers who may profit extraordinarily form high risk exposure but have little to lose because of limited liability consequence.[37] Similarly, Professor Richard Carnell of Fordham University believes that any confidence in shadow banking would be misplaced.[38]

The FSB suggested that systemic risk can arise from the interconnectedness between the banking sector and the shadow banking entities, both directly and indirectly. Shadow banking entities may be directly owned or benefit directly or indirectly by banks as part of the bank's intermediation chain. There may be funding interdependence as, e.g., the holding of the assets such as debt securities of each other's assets. There may be indirect interdependence and risk exposure as a result of investments in similar assets or exposure to common counterparties.[39]

Scholars at the American Enterprise Institute (AEI) dispute whether the Federal Reserve or the FSOC have the authority to regulate shadow banks. According to Peter J. Wallison of AEI and former counsel to President Ronald Reagan, the Dodd-Frank Act does not give either entity explicit power to regulate shadow banking. Congress was concerned with large financial institutions that could pose prudential risk to the financial system and not with control of transactions with each other. They are carrying out the recommendations of the FSB particularly as they relate to money market mutual funds, which are the major source of short-term funding in the capital markets. FSOC designated the same three U.S. insurance firms (AIG, Prudential, and MetLife) that the FSB designated as systematically important financial firms (SIFIs). The FSB source of authority is contrary to statutory authority. Moreover, Title I of Dodd-Frank limits FSOC's authority to firms it finds that their material distress or activities could cause instability to the U.S. financial system. Moreover, Title VIII of Dodd-Frank gives FSOC the authority to designate firms as systematically important. Such power may introduce moral hazards into the relationship between clearing houses and firms using their services. Title VIII does not set forth standards to be applied in making this designation.[40]

CONCLUSION

The shadow banking system is a major component of our national and international financial system. The shadow banking system arose to meet credit demands. At this time the system arguably is financially greater and more important than the traditional banking system. The Dodd-Frank Act and other financial regulations seek to prevent credit lending excesses that pose substantial risk to the overall financial system of the U.S. The relatively unregulated shadow banking system potentially does pose a systemic threat to the financial sector. As a result, it is incumbent upon Congress and other political actors to examine the complexity of the shadow banking system and initiate legislative and other actions to avoid yet another future crisis experienced less than a decade ago.

Whether or not MetLife will prevail will depend ultimately on the U.S. Supreme Court's interpretation concerning the limits of an administrative agency's regulatory interpretation of the Dodd-Frank Act. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the U.S. Supreme Court upheld the Environmental Protection Agency's interpretation of the Clean Air Act of 1977. In doing so, it engaged in a two-part analysis (called the "*Chevron* two-step test"), where a reviewing court determines:

> (a) First, always, is the question whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress.
> If the Court determines Congress has not directly addressed the precise question at issue, the court does

> not simply impose its own construction of the statute
> ….
> (b) [I]f the statute is silent or ambiguous with respect to the specific question, the issue for the court is whether the agency's answer is based on a permissible construction of the statute[41].

The *Chevron* analysis was upheld in *Barnhart v. Walton.*[42] The *Barnhart* decision reversed the Court of Appeals and upheld the interpretation of the Social Security Administration with respect to the denial of disability benefits to individuals who are unable to engage in any substantial gainful activity unless the impairment has lasted or is expect to last for a continuous period of 2 months. The Court of Appeals had interpreted the statute that the 12-month period referred to impairment and not inability to so engage. The *Chevron* analysis appears to be limited to a formal adjudication or notice-and-comment rulemaking. "Interpretations such as those in opinion letters-like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law do not warrant *Chevron-style* deference."[43] The reason for the limitation given by the Supreme Court is that internal agency guidelines are not subject to the "rigors" of the Administrative Procedure Act, which includes notice and comment.[44]

Scholars and financial analysts disagree whether MetLife will succeed in its effort to thwart the efforts of FSOC. The company's shares declined slightly the day it instituted the action dropping 1.2% to $49.81/share. A senior analyst with

MetLife shareholder Snow Capital Management LP, Anna Wickland, believed that the litigation would go nowhere. Michael Barr, a University of Michigan law professor who assisted in the creation of the Dodd-Frank Act, indicated that MetLife faced a difficult legal battle to overturn the designation but Thomas Vartanian, chairman of the law firm of Dechert LLP that specializes in actions brought before the oversight council disagrees with the negative views and stated that MetLife had an excellent chance of prevailing in the litigation.[45]

In the light of the importance of shadow banking to our financial system and referring to previous Supreme Court cases delineating the powers of administrative agencies, it appears that MetLife should and will be regulated. Negotiations between MetLife and the Council, however, continue to this day with no resolution of the controversy, despite wide-spread consensus that MetLife and other nonbank financial intermediation businesses must be regulated.[46]

ENDNOTES

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[1] Paul A. McCulley, *Teton Reflections*, PIMCO GLOBAL BANK FOCUS, (September, 2007), http://www.pimco.com/en/insights/pages/gcbf%20august-%20september%202007.aspx.

[2] Zoltan Pozsar, Tobias Adrian, Adam Ashcraft, and Hayley Boesky, *Shadow Banking*, p. 2, Federal Reserve Bank of New York Staff Reports, No. 458 (July 2010, rev. Feb. 2012), http://www.scribd.com/doc/237269076/Pozsar-Adrian-Ashcraft-Boetsky-Shadow-Banking-Federal-Reserve-Bank-of-New-York-Staff-Reports-N-458-July-2010#scribd.

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[3] Tobias Adrian, and Adam B. Ashcraft, *Shadow Banking Regulation*, Federal Reserve Bank of New York Staff Reports No. 559 (April 2012), p. 2, http://www.newyorkfed.org/research/staff_reports/sr559.html.
[4] *Definition of shadow banking*, FINANCIAL TIMES, http://lexicon.ft.com/Term?term=shadow-banking.
[5] Stijn Claessens, and Lev Ratnovski, *What is Shadow Banking?*, IMF Working Paper (Feb. 2014), www.imf.org/external/pubs/ft/wp/2014/wp1425.pdf.
[6] Investopedia, *Shadow Banking System*, www.investopedia.com/terms/s/shadow-banking-system.asp.
[7] Financial Stability Oversight Council, *supra*, note 33, p. 2.
[8] Dodd-Frank Act §112(a)(2). The Board of Governors is responsible for making recommendations for the establishment of heightened prudential standards for risk-based capital, leverage, liquidity, contingent capital, resolution plans and credit exposure reports, concentration limits, enhanced public disclosures, and overall risk management for nonbank financial companies and large, interconnected bank holding companies supervised by the Board of Governors; and to identify systemically important financial market utilities and payment, clearing, and settlement activities.
[9] *Id.* §113(a)(2). Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies.
[10] Financial Stability Oversight Council, http://www.treasury.gov/initiatives/fsoc/designations/Pages/default.aspx#nonbank.
[11] The Financial Stability Oversight Council was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and is charged with three primary purposes:

1. To identify risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected bank holding companies or nonbank financial companies, or that could arise outside the financial services marketplace.

2. To promote market discipline, by eliminating expectations on the part of shareholders, creditors, and counterparties of such companies that the U.S. government will shield them from losses in the event of failure.

3. To respond to emerging threats to the stability of the U.S. financial system.

http://www.treasury.gov/initiatives/fsoc/Documents/FSOC%202014%20Annual%20Report.pdf.

[12] *Supra,* note 30, p. 30.

[13] *MetLife Inc. v. Financial Stability Oversight Council,* Case 1:15-cv-00045. *See* also, Peter J. Wallison, *The regulators' war on shadow banking,* (Jan. 22, 2015), American Enterprise Institute, www.aei.org/+publication/regulators-war-shadow-banking/.

[14] Complaint Introduction pp.1-7.

[15] 17 U.S. (4 Wheat.) 36 (1819).

[16] National Banking Act of 1864, Ch. 106, 13 Stat. 99, June 3, 1864.

[17] For a detailed discussion of the history of traditional banking and banking regulation in general, see Roy Girasa, LAWS And REGULATION IN GLOBAL FINANCIAL MARKETS, Ch. 5, Palgrave Macmillan, 2013.

[18] Ch. 6, 38 Stat. 251, Dec. 23, 1913, 12 U.S.C. Ch. 3.

[19] Pub.L. 73-66, 48 Stat. 162, June 16, 1933.

[20] Pub.L. No. 103-328, 108 Stat. 2338, 12 U.S.C. 1811, Eff. Sept. 29, 1994.

[21] 12 U.S.C. 2901 et. seq.

[22] Pub.L. 106-102, 113 Stat. 1338, enacted Nov. 12, 1999.

[23] Pub.L. 111-203, H.R. 4173, enacted July 21, 2010.

[24] §606 of the Dodd-Frank Act.

[25] Pub.L. 81-797, 64 Stat. 873, enacted September 21, 1950.

[26] http://fdic.gov/news/board/2011Octno6.pdf.

[27] JP Morgan Chase & Co., Bank of America Corp., Citigroup, Inc., Wells Fargo & Co., and Goldman Sachs Group Inc.

[28] www.bis.org.bcbs.

[29] *Id.*

[30] Joint Final Rule of Office of the Comptroller of the Currency, Department of the Treasury, Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation, Risk-Based Capital Guidelines: Market, June 12, 2012, www.federalreserve.gov/about the fed/boar+dmeetings/market_risk_capital_final_FR_draft_20120607.pdf.

[31] *Id.*

[32] *Op. cit.,*no. 2, p. 2.

[33] Financial Stability Board, *Global Shadow Banking Monitoring Report 2013,* Executive Summary, p. 4. The updated sum of $75 trillion is noted by Simon Richards, *Bringing shadow banking out of the dark,* (Dec. 10, 2014), www.bobsguide.com/guide/news/2014/Dec/10/bringing-shadow-banking-out-of the-...

[34] *Id.*, p. 12.

[35] According to its website, the Financial Stability Board was established to: (a)assess vulnerabilities affecting the global financial system as well as to identify and review, on a timely and ongoing basis within a macro-prudential perspective, the regulatory, supervisory and related actions needed to address these vulnerabilities , and their outcomes; (b)promote coordination and information exchange among authorities responsible for financial stability; (c) monitor and advise on market developments and their implications for regulatory policy; (d)monitor and advise with regard to best practice in meeting regulatory standards; (e) undertake joint strategic reviews of the international standard setting bodies and coordinate their respective policy development work to ensure this work is timely, coordinated, focused on priorities and addresses gaps; (f) set guidelines for establishing and supporting supervisory colleges; (g) support contingency planning for cross-border crisis management, particularly with regard to systemically important firms; (h) collaborate with the International Monetary Fund (IMF) to conduct Early Warning Exercises; (i)promote member jurisdictions' implementation of agreed commitments, standards and policy recommendations, through monitoring of implementation, peer review and disclosure.
The FSB's decisions are not legally binding on its members but operate by moral suasion and peer pressure, in order to set internationally agreed policies and minimum standards that its members commit to implementing at national level. As obligations of membership, members of the FSB commit to pursue the maintenance of financial stability, maintain the openness and transparency of the financial sector, implement international financial standards and agree to undergo periodic peer reviews, using among other evidence IMF/World Bank public Financial Sector Assessment Program (FSAP) reports. http://www.financialstabilityboard.org/about/.
[36] *Id.*, *p*p. 14-15.
[37] Steven L. Schwarcz, The Governance Structure of Shadow Banking: Rethinking Assumptions About Limited Liability, 90 *Notre Dame Law Review* (forthcoming). Available at: http://scholarship.law.duke.edu/faculty_scholarship/3155. A summary of the article discussed at the Harvard Law School Forum o Corporate Governance and Financial Regulation may be found at http://blogs.law.harvard.edu/corpgov/2014/02/06/the-governance-structure-of-shadow-banking/.
[38] Lauren LaCapra, and David Henry, A*nalysis: Five years after Lehman, risk moves into the shadows,* Reuters, (Sept. 12, 2013), www.reuters.com/article/2013/09/12/us-lehman-fiveyear-analysis-idUSBRE98B0562...

[39] Financial Stability Oversight Council, Basis for the Financial Stability Oversight Council's Final Determination Regarding Metlife, Inc., p. 21-23 (Dec. 18, 2014), http://www.treasury.gov/initiatives/fsoc/designations/Documents/MetLife%20Public%20Basis.pdf

[40] Peter J. Wallison, *The regulators' war on shadow banking,* (Jan.2015), American Enterprise Institute Research, www.aei.org/+publication/regulators-war-shadow-banking/.

[41] *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842–843 (1984) See http://www.hawaiilibrary.net/articles/chevron_u.s.a.,_inc._v._natural_resources_defense_council,_inc.

[42] 535 U.S. 212 (2012).

[43] *Chiristensen v. Harris County*, 529 U.S. 576, 587 (2000).

[44] *Id*., citing *Reno v. Koray*, 515 U.S. 50, 61 (1995).

[45] Victoria McGrane and Leslie Scism, MetLife Suit Sets Up Battle Over Regulation, THE WALL STREET JOURNAL, (Jan. 14, 2015), www.wsj.com/articles/metlife-to=challenge-systemically –important-tag-1421152441.

[46] See July 7, 2015 AMERICAN BANKER statement http://www.americanbanker.com/bankthink/large-nonbanks-deserve-fsoc-scrutiny-1075244-1.html