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# MetLife®

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Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Investment Advice Regulations  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue N.W.  
Washington, D.C. 20210

Ladies and Gentlemen:

On behalf of MetLife, Inc., I am writing to comment on regulations proposed under Employee Retirement Income Security Act of 1974 as amended (“ERISA”) Sections 408(g) and 408(b)(14), which were published at 73 Fed. Reg. 49896, (August 22, 2008), (“Proposed Regulation”), and the related proposed class exemption which was published at 73 Fed. Reg. 49924, (August 22, 2008), (Proposed Exemption”). The Proposed Regulations would provide additional details and information on the Pension Protection Act statutory exemption regarding the provision of investment advice, and the Proposed Exemption provides additional exemptive investment advice relief.

We appreciate the significant amount of work and effort of the Department in drafting and releasing the Proposed Regulations and the Proposed Exemption. The preamble to the Proposed Regulations recognizes how important investment advice can be to ERISA plan participants and to IRA holders who are responsible for investing assets in their accounts. In fact, given the proliferation of participant directed individual account plans and IRAs, significant numbers of ERISA plan participants and IRA holders seek to have greater access to professional investment advice. We thus applaud the efforts of the Department to make personalized investment advice available to ERISA plans and IRAs, therefore furthering the ability of participants and beneficiaries to reach their retirement savings goals.

Our comments, which request clarifications and changes to the Proposed Exemption and Proposed Regulation are, as follows:

(1) We suggest clarifications and certain modifications to the Proposed Regulations and Proposed Exemption which are consistent with SEC and FINRA rules and regulations.

This is especially important given the recent Memorandum of Understanding entered into between the Department and the SEC to formalize the agencies' information sharing practices and to improve communication and coordination between the agencies. Given the increased cooperation and interaction between the two agencies, we feel that it would be especially helpful for the DOL to focus on how the SEC and FINRA rules interact with the Proposed Exemption and the Proposed Regulation. Although we are well aware that the SEC and FINRA rules and requirements do not cover each and every investment advice arrangement contemplated and permitted by the Proposed Exemption, the FINRA and SEC rules do regulate a significant portion of the investment advisory arrangements of ERISA plan participants and IRA holders. In this regard, proposing DOL investment advice rules, requirements and disclosures that are consistent with, and not duplicative of the existing SEC and FINRA rules will be in the best interest of ERISA plan participants and IRA holders, and the advisory community. Thus, please note the following SEC/FINRA related comments:

(a) Section III (b) and (c) of the Proposed Class Exemption generally requires that the investment advice be based on generally accepted investment theories that take into account the historic returns of different asset classes over defined periods of time, and the investment advice must take into account information furnished by a participant or beneficiary relating to age, life expectancy, retirement age, risk tolerance, other sources of income, and investment preferences, but additional information provided by the participant can be considered. Similar requirements exist in the Proposed Regulations.

We have concerns that the person providing investment advice must take into account certain required information obtained from the plan participant. However, some of the listed information should not be required if (a) the participant does not want to provide such information, and (b) the advisor has enough other information to make a well-founded and reasonable recommendation. Under existing securities law, investment advice must be suitable for the client. Pursuant to the SEC and FINRA rules, both investment adviser representatives ("IARs") and registered representatives ("RRs") must have reasonable grounds for believing that the recommendation is suitable for the customers such as ERISA plan participants or IRA beneficiaries, based upon the facts, disclosed by such customer as to his security holdings, financial situation and needs. Firms must also make reasonable attempts to obtain information concerning a customer's financial status, tax status, investment objectives and such other information used or considered to be reasonable by them in making recommendations to the customer such as the customer's age, employment status, annual income, net worth, prior investment experience, time horizon, risk tolerance, source of funds, and purpose for investing in the financial product. Please note that pursuant to the FINRA suitability rules, firms are required to make a reasonable attempt to obtain customer information; as FINRA recognizes that in some situations the client may not wish to share certain information with the RR. However, if clients do not provide the RR with enough information to form the basis of a suitable recommendation, the RR cannot offer the recommendation because he will not be able to comply with the suitability rule.

From an operational perspective, any departure from current FINRA and SEC requirements will necessitate firms to create new operational processes, compliance structures and IT processing systems. Thus, we request that the DOL not mandate what information must be obtained from plan participants pursuant to the formulation of investment advice. Rather, consistent with the SEC and FINRA rules, there should be reasonable attempts to request, obtain and utilize relevant investment advice related information that both the RR and the plan participant agree on, and the RR must reasonably conclude that there is enough information to make a well founded and reasonable recommendation. Eliminating inconsistencies between the DOL proposals and existing SEC and FINRA rules will be in the best interest of plan participants and IRA holders.

It should also be noted that regarding the type of information the FINRA rules require the RR to make reasonable attempts to obtain, there is no mention of "life expectancy". Rather, FINRA, through its interpretative guidance notice to member releases, and Rule 2821, requires that reasonable attempts be made to obtain information regarding a customer's investment "time horizon". Thus, we request that life expectancy information not be requested, but rather time horizon information be substituted instead, or at the very least, since the term "life expectancy" does appear in the ERISA provisions, life expectancy should be interpreted to mean "time horizon." It should be noted that a person's investment time horizon measures the length of time over which an investment is made or held before it is liquidated. When RRs take into account a person's time horizon and risk tolerance, a more suitable asset allocation strategy can be recommended. Therefore, we question the purpose of taking into consideration a person's life expectancy when offering investment advice. We believe that a person's time horizon for the investments in his or her account is a more appropriate question to ask when determining suitability. RRs typically are not equipped to determine "life expectancy." The estimation of life expectancy is generally associated with the sale of life insurance and involves actuarial calculations and subjective underwriting, based upon the individual's age and health, among other factors. Even there, life expectancy is not a precise calculation, but generally results in a classification into a group (e.g., standard vs. preferred) based upon the risk that the individual will die sooner or later than the "average life expectancy" for other similar individuals.

Even assuming that the DOL intends for a RR to determine some average estimated life expectancy for an individual, the question remains how is this information to factor into the calculation of whether or not the advice is reasonable? Does the RR need to conclude that, based upon the advice, the client will have sufficient funds to meet their economic needs for as long as they live? If that is the intent, then the formulation is unworkable. Whether or not a particular investment will be sufficient to meet the individual's economic needs for life is subject to too many unpredictable variables, including the amount invested, the returns generated in the future, and the amount withdrawn by the client in the future. For example, a RR could run a Monte Carlo simulation which would show that a particular investment at an assumed rate of return would support the withdrawal of 4% per year from the client's account from age 65 for the client's reasonable life expectancy. However, what if the actual rate of return is different, what if the client withdraws 5%, or what if the client lives longer than expected? These are

questions that a RR cannot answer at the time that the advice is given. Therefore, including "life expectancy" in the factors to be considered does not provide any greater protection to the participant/customer than the factors required to meet the suitability requirement under the federal securities laws.

(b) Section III (j)(1) of the Proposed Exemption generally requires that the firm providing investment advice must annually engage an independent unaffiliated auditor who within 60 days, provides a report to the firm and plan sponsors as to whether all the ERISA investment advice requirements are met. For IRAs, 30 days after the firm receives the auditors report, the report must be sent to the IRA holders, or the IRA holders must be notified that the report is posted on the firm's website. Further, if the report of the auditors identifies noncompliance with the policies and procedures or conditions of the Proposed Exemption, the DOL must be sent a copy of the report. The Proposed Regulations also contain these audit requirements.

It should be noted that pursuant to the SEC rules and similar regulations, all Broker Dealers and Registered Investment Advisors are examined by their functional regulators on a regular basis. Broker Dealers and their branch offices are examined by FINRA, state securities regulators and the SEC. Registered Investment Advisors that are registered with the SEC are examined by the SEC and those that are registered with a state securities regulator are examined by that state's regulator. Regulators generally focus their exams on the firm's sales practice, including suitability of customer recommendations. Additionally, Broker Dealers and Registered Investment Advisors are required to audit their operations to ensure compliance with regulatory requirements, including sales practice and suitability as outlined above, on an annual basis (See FINRA Rule 3012 and Rule 206(4)-7 of the Advisers Act).

The Proposed Exemption requires that if the report of the auditors identifies noncompliance with the policies and procedures or conditions of the Proposed Exemption, the DOL must be sent a copy of the report. Pursuant to the SEC and FINRA rules, depending on the nature of the violation, firms generally can correct certain minor oversight or operational or rule violations during an audit exam if they are immaterial (i.e., someone forgot to sign off on one document vs. hundreds). Thus, the firm can correct the deficiency without it being referenced in the findings report. Also, for certain somewhat more significant noncompliance that is deemed not to be harmful to investors, the firm can take corrective action during the audit exam. The audit report will show that a deficiency was found but was corrected during the exam or that the firm will put corrective measures in place. In these situations, the firm will receive a letter of caution and no penalty will be assessed. For situations where harm to investors is found or for repeat violations, the matter will be referred to the regulator's enforcement division for review. Similar to the SEC and FINRA rules, we request that the Proposed Exemption be modified to permit firms to correct, without penalty, immaterial oversight or operational violations during the audit. When immaterial oversights or operational violations are fully corrected during the course of the audit this information should not be included in the audit report since the violation no longer exists.

(c) For investment advice that follows use of a computer model or the provision of investment education, Section III (e)(4) of the Proposed Exemption generally requires that within 30 days of providing the advice, the individual providing the advice must document the basis for the advice and how it relates to the computer models or investment education materials provided. Further, if the advice provided results in greater compensation to the individual advisor, the firm/employer, or affiliates, or to any person with a material contractual relationship with the foregoing, the individual providing the advice must prudently conclude that the advice provided is in the best interest of the plan participant or IRA holder, and the basis for this conclusion must be documented and explained to the plan participant or IRA holder.

As for the basis of the investment advice, RRs are required to comply with the SEC and FINRA suitability standard as described in Paragraph (a) above. While generally there is no explicit requirement that an RR must document the basis for advice, the rules cited in Paragraph (a) demonstrate that certain information about the customer that helps to form the basis of a RRs recommendation must be collected from the client and documented by the RR. Additionally, for advisory programs and financial plans, customers generally receive an investment policy statement or a financial plan, respectively, that outlines the basis for advice in accordance with, for example, a person's time horizon, net worth, prior investment experience, risk tolerance, etc. Firms also generally require a customer to complete a switch form when they switch mutual funds or certain products because such switch forms generally outline the suitability considerations that securities regulators require a firm to consider, and to disclose to their customers, when recommending a switch. Therefore, Broker Dealers and Registered Investment Advisors are already implementing investment advice documentation's and disclosures to clients pursuant to existing securities law.

We request that to the extent the DOL proposed documentation requirements are already satisfied in whole or in part pursuant to existing SEC or FINRA investment advice documentation rules, no duplication of documentation effort be required by the DOL.

Regarding the documentation of advice requirement, the Proposed Exemption states further that if the advice provided results in greater compensation to the individual advisor, the firm/employer, or affiliates, or to any person with a material contractual relationship with the foregoing, the individual providing the advice must prudently conclude that the advice provided is in the best interest of the plan participant or IRA holder, and the basis for this conclusion must be documented and explained to the plan participant or IRA holder. For purposes of the SEC and FINRA rules a recommendation must be suitable in all circumstances regardless of whether greater compensation is paid to the individual advisor, firm, etc. Similarly, pursuant to the ERISA rules, all investment advice must be in the best interest of the plan participant or IRA holder regardless of the compensation arrangements. Thus, since the "best interest of the participant" standard is the existing ERISA rule which must be followed in all advisory circumstances, we see no reason to have to document and disclose this existing requirement when greater compensation is paid.

Further, because RRs typically have no information or knowledge as to the fund compensation arrangement of the firm, affiliates, persons with material contractual relationships, etc., and since these fund fee arrangements continually change, it would be impractical for the RR to determine accurately which entities receive greater compensation each and every time investment advice is provided. Thus, instead, the RR should, in all cases, explain the basis of his recommendation and refer the participant to how he can access the latest updated version of the required disclosures.

(d) Section III(g)(1) of the Proposed Exemption requires that numerous disclosures be made to the participant or beneficiary, including the requirement that the recipient of the advice may separately arrange for the provision of investment advice by another person or firm that has no material affiliation with and receives no fees or compensation in connection with the funds offered.

Pursuant to the SEC rules, Broker Dealers are generally required to disclose the compensation that they receive for a transaction under Rule 10b-10 of the Securities Exchange Act of 1934 and must disclose material conflicts of interest under Rule 2110. Additionally, firms generally disclose to their customers all fees and expenses associated with maintaining an account in the account opening documents. When a customer has a fee schedule and a conflict of interest disclosure document, the customer has all of the necessary information to make an informed decision on whether to establish a business relationship with the firm. Therefore, the customer is free to compare firms and choose a firm with whom he wishes to establish and maintain a business relationship.

Under Rule 204-3 of the Advisers Act, Registered Investment Advisors must provide their customers with a disclosure brochure at the inception of the advisory relationship containing the advisory fee charged, any compensation arrangement that may pose a conflict of interest, all material conflicts of interest, and that similar investment advice may be obtained from other RIAs for the same or lower cost. Though, under the existing Rule 204-3, RIAs are required only to offer this brochure to their customers on an annual basis once a business relationship has been established. Regarding the aforementioned specific disclosure requirement and all other disclosures required by the Proposed Exemption, the mandatory annual disclosures should be modified to read that if a firm can satisfy DOL's disclosure requirements through disclosure documents required by other regulators, no separate disclosure document will be required, since customers will not benefit from receiving identical disclosures on an annual basis. Further, DOL's proposed rule should be revised to read that firms are only required to provide the disclosures on an annual basis when there is a material change from the initial disclosure. This will reduce mailbox clutter and mailing costs. In summary, the DOL disclosures should be deemed satisfied to the extent that the SEC/FINRA disclosures would satisfy the applicable DOL requirements.

(e) Section I of the Proposed Exemption applies to the provision of investment advice to participants and beneficiaries of individual account plans. We request that the exemptive relief provided by the Proposed Exemption regarding fee neutrality, computer

and IRA off-model advice also apply to plan sponsors of employee benefit plans. Pursuant to the SEC and FINRA, the rules for providing investment advice to plan sponsors or plan participants by Broker Dealers and Registered Investment Advisors are generally the same. On providing a recommendation, one needs to make sure that the recommendation is suitable for the customer. The suitability rule does not exempt a Broker Dealer or Registered Investment Advisor from ensuring that the advice or recommendation that is provided to institutional customers, such as plan sponsors of ERISA plans, is suitable. Similarly, pursuant to the ERISA rules, there is no distinction between providing investment advice to plan participants or plan sponsors as both advisory arrangements are subject to the ERISA fiduciary and prohibited transaction rules. Thus, from a regulatory standpoint, the exemptive relief that is proposed pursuant to the Proposed Exemption, should apply to both plan participants and plan sponsors.

It should be noted that there are significant numbers of plan sponsors who also seek the provision of investment advice. In this regard, plan sponsors seek specific recommendations as to which funds and investments to make available to plan participants. By expanding the Proposed Exemption to make investment advice relief available to plan sponsors, plan participants will also benefit since their investment performance is to a large extent determined by investment options and choices made available by the plan sponsor. Also, pursuant to the Proposed Exemption, RRs and other individual advisors would be able to approach plan sponsors and offer investment advice services to the plan participants pursuant to the fee neutrality or off-model advice provisions. Yet, these same RRs would likely not be able to offer the same investment advisory service to the plan sponsor regarding the fund line-up, etc., because the exemption would not apply to plan sponsor advice. Thus, we request that the relief provided by Section III, paragraphs, (e)(1) and (e)(2) and (f) of the Proposed Exemptions should also be made available for plan sponsors.

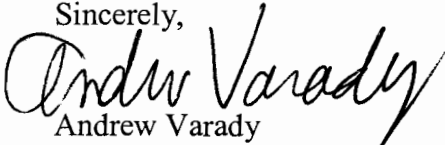
(2) Section V of the Proposed Class Exemption states that if there is a pattern of noncompliance with any of the conditions of the exemption, the exemption would not apply to any advice given by the fiduciary advisor during the period that the pattern of noncompliance existed. We do understand that the Department cannot tolerate deliberate noncompliance. However, if all the individual advisors of a very large firm except one, comply with the provisions of the exemption, it seems extreme that all compliant individual advisors should be penalized. Rather, any exposure of liability should be limited to the one offending advisor. Similarly, if an inadvertent error is made, such as leaving out one piece of information from the annual disclosure notice, this could be viewed as a pattern of errors resulting in loss of the exemption. Nonetheless, this one inadvertent error should be subject to a materiality standard, and thus, there should be an ability to correct an immaterial mistake and preserve the exemption.

(3) The proposed regulations and class exemption generally require that any computer-based investment advice program must take into account all of the designated investment alternatives available under a plan. The Department has, however, created exceptions for company stock funds and self-directed brokerage windows. The exception for company stock funds provides that an eligible investment advice arrangement may, but does not

have to, take company stock funds into account. We recommend a similar exception for in-plan annuity investment options. As we are aware, in recent years, a number of individual account plans have introduced annuity purchase programs that serve as both accumulation and distribution options. Some investment advice programs are able to take these annuity investment options into account while others are not. We believe that plans with these investment options should not be barred from reliance on the new rules and we recommend a parallel exemption allowing the program to either take into account or disregard an annuity investment option under a plan.

On behalf of MetLife, we thank the Department for considering these comments. Attorneys from the Broker-Dealer Unit of the MetLife Law Department worked with me to prepare the SEC/FINRA related comments, and we are available to discuss these comments with the Department.

Sincerely,

A handwritten signature in black ink that reads "Andrew Varady". The signature is written in a cursive style with a large, prominent initial "A".

Andrew Varady  
Associate General Counsel