MetLife

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary, RIN 1210-AC02
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: ZRIN 1210–ZA33; ZRIN 1210-ZA32
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary (RIN 1210-AC02); Proposed Amendment to PTE 84-24 (ZRIN 1210-ZA33, Application No. D-12060); and Proposed Amendment to PTE 2020-02 (ZRIN 1210-ZA32, Application No. D-12057)

Dear Sirs and Madams:

On behalf of Metropolitan Life Insurance Company and its affiliates ("MetLife"), we are writing to comment on the Department of Labor's (the "Department") proposed regulation and proposed amendments to the prohibited transaction exemptions referenced above (collectively, the "Proposal").

For over 150 years, MetLife has been helping to insure the financial well-being of the people who depend on us. Our success is based on our long history of social responsibility, strong leadership, sound investments, and quality products and services. Since its founding in 1868, MetLife has continuously evolved, transforming to meet consumers' changing needs and reflect the environment within which we work. While the world continues to change at a rapid pace, one thing

remains constant: our commitment to building a more protected world for individuals, families, and communities. Today, a time when consumers are feeling a greater financial burden than ever before, MetLife is helping millions of customers prepare for retirement. MetLife's trusted brand, capital strength, and existing relationships with millions of individual and institutional customers around the globe inform MetLife's comments on the Proposal.

We support, in full, the comments The Committee of Annuity Insurers (the "Committee") submitted on the Proposal including the overarching comment that the "Proposal suffers from the same fatal flaws that led the Fifth Circuit to vacate the Department's attempt in 2016 to expand the definition of an 'investment advice fiduciary' beyond the scope of ERISA and congressional intent. Even more troubling, the Proposal would significantly harm retirement savers, particularly those with lower incomes, by reducing their access to important services and annuity products – an outcome that was well-documented in the aftermath of the 2016 fiduciary rule."

We agree with the following comments of the Committee and are:

> hopeful that the Department will take seriously the risk that, unless the Proposal is withdrawn and reproposed, it will not survive a court challenge and the Department will find itself right back where it was in 2018 – forcing the industry to spend many millions of dollars to get ready to comply with a rule that never went into effect (or did so only briefly). We also hope that the Department will prepare a reproposal that is balanced and thus could gain support from all sides and survive political changes in the future. That would be the best outcome.
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> But Committee members are realistic that the Department likely will move quickly to a final rule. If that occurs, ***the fundamental flaws in the test must be addressed***. The test for fiduciary status that the Department has proposed is so broad that it encompasses many interactions that are not fiduciary in nature. As noted earlier, the proposed test for fiduciary status is *worse* than the 2016 Fiduciary Rule because it not only covers the same non-fiduciary conduct and individuals, but relies exclusively on a facts and circumstances test and uses terms and phrases that are brand new.

Of particular concern to us are the following fundamental flaws:

1. **"Recommendation" is undefined and unclear.** The term "recommendation" is not defined in the text of the Proposal and instead is addressed in the preamble as "a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action." A mere "suggestion" is too nebulous and too low a bar to establish a fiduciary relationship of trust and confidence. For example, we believe this will chill the ability of an insurer to explain to a participant the rights and benefits available under their in-plan annuity option -- an annuity option, we would note, that the plan's fiduciary approved and to which the participant decided to allocate funds. A similar concern will also come into play when the insurer explains the annuity to a plan sponsor and not just in the context of directly communicating with a participant. In these respects, the Proposal undercuts the intent of Congress in the SECURE 2.0 Act of 2022, which explicitly encourages wider availability and use of annuities in defined contribution plans. Accordingly, the Proposal should at a minimum make it clear that communications and

actions that merely facilitate a participant's requests and directions or are reasonably related to the administration of the product do not constitute "recommendations."[1]

2. **"Particular needs or individual circumstances" is meaningless.** Similarly, the Proposal simply requires that "the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor." At a minimum, a communication should be explicitly customized or tailored to a particular plan or individual to constitute a recommendation. Otherwise, this phrase has little meaningful substantive content as nearly every responsive interaction with a plan or individual will be based in some way on each of their particular needs or individual circumstances.

   We would reemphasize the point neatly made by the Committee when it comments that:

   > imagine that a defined benefit plan consultant contacts an insurance company to ask them to meet with the consultant and the plan committee to discuss pension de-risking, or to discuss annuities that will be used to terminate the plan. A salesperson from the insurance company then gives a presentation explaining why the plan should choose their products. This will clearly be a sales conversation, but the suggestions being made are clearly based on the particular needs or individual circumstances of the plan—namely the plan wishes to de-risk or terminate.
   >
   > For similar reasons, merely responding to any request for proposal (RFP) from a plan regarding any aspect of the plan's investments or benefits could be a fiduciary act under the Proposal. In fact, we submit that, other than generic pamphlets, newspaper articles, and other communications aimed at no one in particular, nearly every "suggestion" could be said to be, in some way, based on particular needs or individual circumstances.

3. **The need for a true exception for sales conversations.** Because of the extremely broad reach of the test for fiduciary status, it is critical, as the Department recognized in 2015, that the Proposal "appropriately distinguishes incidental advice as part of an arm's length transaction with no expectation of trust or acting in the customer's best interest, from those instances of advice where customers may be expecting unbiased investment advice that is in their best interest." This distinction is particularly warranted in the institutional context**,** e.g., the group annuity, group life and welfare benefit plan contexts, as the interests of participants under those types of arrangements are already protected by the fiduciary who has vetted, selected and monitored the provider in the first place. In other words, as a fiduciary is already interposed between the group-product provider and the plan's participants, it is unnecessary to require the seller of a group-based product to also act as a fiduciary.

   The Department thought about this problem correctly in 2010 in proposing that a person is not a fiduciary if they can demonstrate:

[1] For example, facilitating the enrollment of a new defined contribution plan participant under an existing group annuity should not by itself constitute a "recommendation" or otherwise be considered a fiduciary act on the part of the annuity issuer.

> that the recipient of the advice knows or, under the circumstances, reasonably should know, that the person is providing the advice or making the recommendation in its capacity as a purchaser or seller of a security or other property, or as an agent of, or appraiser for, such a purchaser or seller, whose interests are adverse to the interests of the plan or its participants or beneficiaries, and that the person is not undertaking to provide impartial investment advice.

While the Department helpfully noted in the preamble to the Proposal that, "[t]o the extent counterparties wish to avoid fiduciary status, they can avoid structuring their relationships to fall within the circumstances described in [subparagraph (c)(1)(ii)]," we reemphasize the point stressed by the Committee, **"that those who deal with ERISA plans and IRAs must be able to know with certainty that they are not going to be treated as fiduciaries.**"[2]

4. **The test improperly attributes affiliate services**. There is no reason, particularly with respect to institutional investment managers, to attribute the asset manager's fiduciary status with respect to a given plan to the entire organization to which that asset manager belongs. To borrow the Committee's example, "assume an insurance company's investment management affiliate is managing funds for a plan in a group annuity contract separate account. The plan committee asks the insurance company to discuss whether it can offer annuities as distribution options for the plan. If the insurance company's representative makes any suggestion as to what the plan committee should do with respect to these annuities, fiduciary status is triggered. It is not necessary that the sales conversation is based on the needs of the plan, or even that the plan committee might use that sales pitch to assist it in making decisions for the plan." Further, institutional asset managers use negotiated, bespoke investment management agreements (IMAs) in which the plan clearly delineates, one, the assets the affiliate has fiduciary discretion to manage or advise on and, two, the investment guidelines to which the manager/advisor must adhere. There is no need to muddy this fiduciary relationship by extra-contractually expanding fiduciary status across all affiliates of the asset manager as there is no risk a plan will be confused which arm of the firm is managing its assets as a fiduciary and which is merely selling it a solution.

5. **The definition of investment property is overly broad**. The Proposal defines the term "investment property" such that it "does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component." When coupled with the definitions of "plan participant" and "plan," the Proposal extends to welfare benefit arrangements such as permanent life insurance offered under employer arrangements (e.g., group universal life). As noted above, the Proposal is overly broad in this respect -- participants in employer-provided welfare benefit arrangements already benefit from a duty of fiduciary loyalty from the plan administrator. At a minimum, the definition of "investment property"

[2] To the extent the Department decides to fall back on a "sophisticated investor" exception it should seek further comment to ensure the contours of such an exception are reasonable in terms of number of plan participants or size of plan assets required to qualify as "sophisticated."

should be revised so that it does not include life insurance or annuities offered under a group arrangement.

6. **A reasonable implementation period is needed, and existing products should be grandfathered.** The Department has proposed to make the Proposal effective 60 days after publication of the final rule and PTEs in the Federal Register. This effective date is unrealistic and should be revised to provide a meaningful period for impacted parties to engage in a thoughtful compliance effort. We agree with the Committee in strongly urging the Department to provide that the Proposal does not apply to annuities sold and other arrangements entered prior to the effective date of the regulation, including with respect to commissions and other compensation on premiums paid on contracts sold prior to the effective date.

If you have any questions, or if MetLife can be of any assistance in your consideration of the issues summarized above, please do not hesitate to contact us.

Sincerely,

Graham Cox
Executive Vice President