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Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Conflict of Interest Rule; RIN-1210-AB32
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210



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Office of Exemption Determinations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
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RE: MetLife Comments on the:

- A. Regulatory Impact Analysis**
- B. Proposed Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice – RIN 1210-AB32**
- C. Proposed Best Interest Contract Exemption – ZRIN 1210-ZA25**
- D. Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTCE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters – ZRIN 1210- ZA25**
- E. Other Comments**

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 ("Department's") notice of proposed rulemaking regarding the Definition of the Term "Fiduciary"(the "Proposed Regulation" or "Proposal") and the accompanying proposed Best Interest Contract ("BIC") Exemption and proposed Amendment to and Proposed Partial Revocation of PTCE 84-24.

For 140 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. In 1909, MetLife Vice President Haley Fiske announced that "insurance, not merely as a business proposition, but as a social program," would be the future policy of the company. As a first step, Fiske hired the pioneering industrial social worker Lee Frankel to work at MetLife. Frankel envisioned insurance as a powerful means toward improving the lot of the underprivileged. That fundamental tenet – the use of insurance to promote and advance social well-being – continues to guide MetLife today as one of the world's leading global life insurance and employee benefits companies. MetLife is dedicated to meeting people's growing need for first-rate financial products and services through various life stages and economic cycles.

MetLife's trusted brand, capital strength, and existing relationships with millions of individual and institutional customers around the globe uniquely influence MetLife's comments on the Proposed Regulation and the related exemptions referenced above. Today, a time when consumers are feeling a greater financial burden than ever before, MetLife is helping millions of customers prepare for retirement.

This comment letter addresses the numerous, significant challenges MetLife has identified concerning the Department's Proposed Regulation and related exemption proposals. Below, we have summarized three of our overriding concerns with the Proposal.

- **Fiduciary Liability for Basic Customer Communications and Prohibited Transaction Status for Proprietary Sales Under the Proposal will Effectively Deny Access to Lifetime Income Guarantees by American Workers.**

Unless it is changed substantially, the Department's Proposal will convert virtually every writing and every utterance made by an insurer or its distributors to small plans, plan participants, beneficiaries and IRA owners into a fiduciary communication. Moreover, the Proposal would then categorize the marketing and sale of proprietary guaranteed lifetime income products as activity that is prohibited in the absence of exemptive relief. The prohibition of direct sales of proprietary variable annuity products (which cannot be made revenue neutral with non-proprietary product sales to the manufacturing company) will force the hand of long-standing, well-respected financially strong institutions like MetLife to choose between selling annuity products or exclusively manufacturing annuity products to be sold through unaffiliated distribution channels. As written, the Proposal effectively eliminates MetLife's ability to bring more than 140 years of financial expertise to future consumers in this market.

- **The Proposed Best Interest Contract ("BIC") Exemption Conditions and Proposed Amendment to PTCE 84-24 set an Unachievable Standard.**

The Department proposes to apply a death blow to the sale of annuity products and their guarantees of lifetime income to individual plan participants and IRA owners by exempting

these sales from prohibited transaction status only under conditions that set an unachievable standard. The proposed BIC Exemption – the sole exemption available to cover the sale of individual variable annuity products – compels selling firms and their representatives to expose themselves to class action litigation risk by signing on to standards of conduct and warranties that are both so onerous and so amorphous as to defy even the most ardent compliance efforts. Further, the insurance industry’s traditional source of prohibited transaction exemptive relief, PTCE 84-24, has been made more uncertain by including things like impartial conduct standards, which would effectively deny access to and utilization of guaranteed lifetime income products by working Americans. This completely contradicts the Administration’s own long-standing public policy position of encouraging consumers to contract for guaranteed lifetime income benefits. With the substantial decline of defined benefit pension plans, insurance and annuity products, whether sold to employers or individuals, have become the foundation on which Americans can build individual retirement security. Encouraging individuals to take care of themselves and their own best financial interests by delaying the immediate gratification associated with consumption in favor of a lifetime income product is not easy. That having been said, MetLife and other insurers have developed the resources, including skilled, highly trained agent sales forces, that can help American workers make prudent, long term decisions regarding their retirement security. The resources and programs developed over many years to support annuity product distribution should not be dismissed lightly.

- **The Day to Day Functions of Welfare Benefit Plans could be Substantially Disrupted in the Absence of Clarification.**

The sweeping language of the Proposed Regulation does not distinguish between providing investment advice, as re-defined, to employee welfare benefit plans on the one hand and employee pension benefit plans on the other. Rather, its terms are proposed to apply to any employee benefit plan described in Section 3(3) of ERISA. Yet virtually all of the discussion accompanying the Department’s package of regulatory proposals, including its economic analysis, pertains to employee pension benefit plans and IRAs. The single exception appears in footnote 18 to the proposed BIC exemption which clarifies that the defined term “Retirement Investor” is not intended to limit the availability of BIC exemptive relief to employee pension benefit plans (i.e., exemptive relief under BIC is also intended to be available to investment advice fiduciaries of employee welfare benefit plans). MetLife strongly urges the Department to clarify that the Proposed Regulation does not apply to welfare benefit plans, which differ fundamentally from retirement plans in myriad ways and to avoid unnecessary disruption to settled practices in the marketing and sale of welfare benefit plan insurance products.

- A. **The Department’s economic impact analysis is deeply flawed and does not reflect true expense, potential business disruption or costs that will likely be passed on to customers.**

Executive Order 12866, Regulatory Planning and Review, (Oct. 4, 1993), available at 58 Fed. Reg. 51735 requires federal agencies to submit a regulatory impact analysis to the Office of Management and Budget (“OMB”) for any “significant regulatory action.” Significant regulatory actions described by EO 12866 include those likely to result in a rule that may have an annual effect on the economy of \$100 million or more or adversely affect the economy or a sector of the economy in a material way.

Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011), available at 76 Fed. Reg. 3821 incorporates the requirements of Executive Order 12866 and also specifically directs agencies “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”

MetLife is deeply concerned that the Department’s regulatory impact analysis, as summarized with the Proposal, exaggerates the Proposal’s benefits and dramatically understates its associated compliance costs. In particular, the Department’s estimates of between \$2.4 billion and \$5.7 billion over ten years for the industry as a whole appear to have captured only a fraction of the actual cost. The information technology development costs associated with meeting the proposed BIC exemption conditions alone are enormous. On an industry-wide basis, those costs alone appear likely to far surpass the Department’s total ten year compliance cost estimate.

For this reason, MetLife urges the Department to limit the disclosure requirements under the proposed BIC exemption and amendments to existing class exemptions to those that leverage presently existing disclosure production capabilities (e.g., the production of disclosure materials under the Department’s Section 408b-2 and 404a-5 disclosure regulations). MetLife requests that one definition of “reasonable compensation” or “reasonable compensation practices” be spelled out with clarity in the regulation and be referenced across all PTCEs. MetLife requests that any breach of the duty of loyalty, which can occur even through an inadvertent and minor misrepresentation, be exempt from prohibited transaction penalties. Within the BIC exemption, MetLife requests that it be made clear that to be actionable under the BIC contract the misrepresentation must have “a causal relationship to material economic harm.” MetLife specifically asks that the language in quotes immediately above be added after the words “misrepresentation” in the BIC exemption. Finally, MetLife and all other impacted providers need existing contracts, where specific guidance on investing within the product are not being provided, to be grandfathered and exempt from the new PTCE and carve out requirements (provided the transactions met prior versions of these PTCEs and carve outs). Specifically with regard to BIC, the definition of “covered transaction” in Section VII(b) of the exemption should be amended to eliminate requirement (1), modify requirement (2) to note that “Compensation is received by the firm or the advisor pursuant to a product sale or other purchase that

occurred prior to the Applicability Date,” modify requirement (3) to note that the advisor and the financial institution do not provide advice directly to the individual concerning investments within the product, holding or disposing of the product after the “Applicability Date” and maintain the terms of requirement (4). With regard to all other PTCEs exceptions and carve outs, we request that only the requirement that the purchase or sale was not a non-exempt prohibited transaction pursuant to ERISA on the date it occurred apply. Without these modifications outreach to all existing customers for representations, exchanging of warranties or with BIC contracts would be cost prohibitive by itself.

1. The Department’s Reference to the United Kingdom’s Statutory Modifications to Investment Advice in the Department’s Economic Impact Analysis is Misguided.

A recent report by Fidelity Worldwide Investments and Cass Business School concluded that as a result of the UK’s administrative scheme, an investor in the UK with less than £61,000 (approximately, \$110,000 USD) in investment funds is no longer commercially viable for investment advisory services. The study concluded that, in an environment in which approximately 75% of the country’s adult population has less than that amount to invest, there is significant risk that such individuals will be unable to access investment advice. In a similar analysis, Deloitte reported that reforms will likely result in up to 5.5 million customers in the UK who will either discontinue financial advisory services or will be unable to access such services. At least 60,000 investors already have reportedly been refused financial guidance due to small account balances. Martin Wheatley, former Chief Executive of the UK Financial Conduct Authority, noted in 2013, “It is a concern. People who have . . . portfolios below [\$80,000 US] to [\$160,000 US] are not getting the same service they were getting. That is a concern.” More recently, in July of 2015, John Griffiths-Jones, the Chairman of the UK Financial Conduct Authority acknowledged that there is an advice gap in the UK due to the RDR at an industry event. Mr. Griffiths-Jones noted that there was an advice gap and that people cannot afford advice. He said that the system the FCA introduced was at the level of a Rolls Royce, but they needed one that was also at the level of a Ford.

In the advent of reforms similar to those presently encompassed in the Department’s Proposal, the UK’s large banks ended their mass-market retail advice, or began significantly reducing such services, before the legal reform was implemented at the end of 2012. For example, the Guardian reports that in 2012 both Royal Bank of Scotland and HSBC each terminated approximately 700 investment advisors and related employees, citing the new law. Lloyd’s Banking Group, upon learning that most customers were unwilling to pay market investment

advisory fees, ended its face-to-face advisory services for all customers with less than £100,000 in assets.¹

MetLife asks the Department to keep in mind the serious and real risk of loss of access to advice and products to consumers that are not “high net worth” as it decides whether and how to accommodate the requests set forth in this letter and letters from industry groups.

B. Comments on the Proposed Regulation.

As stated in the Preamble to the Proposal, plans, plan participants, and beneficiaries, and IRA owners are often not “financial experts” and consequently must rely on professional advice to make critical investment decisions. Furthermore, the Preamble notes the recognition by Congress of the importance of investment advice to protect savers’ retirement nest eggs, and how in recent years, the significance of financial advice has become still greater, especially with increased reliance on participant-directed plans and self-directed IRAs to provide retirement security and benefits.

MetLife shares the Department’s views regarding the importance of making professional investment advice available to plans, participants, beneficiaries, and IRA holders to enhance retirement security. In particular, MetLife agrees with the Department’s view that lifetime income guarantees are an essential component of retirement security. MetLife has supported and continues to support the Department’s initiatives to encourage access to and utilization of guaranteed lifetime income products by employer-sponsored retirement plan participants. As an introduction to the specific comments listed below, MetLife wishes to emphasize the unique and critical role of annuities in helping Americans achieve true retirement security. An annuity is a promise to pay a guaranteed stream of income in exchange for payment of consideration to the issuer, including the costs associated with providing that guarantee. For defined contribution plan participants and IRA holders, only an annuity can provide guaranteed income for life. As defined benefit pension plan coverage continues to decline, and working Americans

¹ For source information on the UK, see, the following authorities compiled by Sutherland Asbill on behalf of MetLife: Cass Consulting, The Guidance Gap: An Investigation of the UK’s post-RDR Savings and Investment Landscape 2 (2013), available at <http://www.cassknowledge.com/sites/default/files/article-attachments/the-guidance-gap.pdf>. And Deloitte, Bridging the Advice Gap: Delivering Investment Products in a Post-RDR World 9 (2012), available at <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/financial-services/deloitte-uk-fs-rdr-bridging-the-advice-gap.pdf>. Europe Economics, Retail Distribution Review Post Implementation Review 67 (2014), available at <http://www.fca.org.uk/static/documents/research/rdr-post-implementation-review-europe-economics.pdf>. and, The Guardian, FSA Ban on Commission-Based Selling Sparks ‘Death of Salesman’ Fears (Dec. 30, 2012), <http://www.theguardian.com/business/2012/dec/30/fsa-ban-commission-selling-death>. A Rostrum Research survey recently found that 90% of UK customers are only willing to pay £25 per hour for investment advice, compared to the researchers’ expected result of £50-£250. Rostrum Research, Retail vs. Financial Services: The Battle for Consumer Trust 13 (2012).

become ever more reliant on defined contribution plan savings, the role of annuities as a source of financial security is taking on an ever-increasing significance. Simply put, an income replacement annuity should be a fundamental component of every American worker's comprehensive retirement plan. The guarantees available through annuity products from MetLife and other insurers allow individuals the peace of mind that they can retire from the workforce with dignity and without worry they will outlive their savings. The availability of annuity products as a means of responsibly addressing longevity risk should be encouraged, not suppressed.

Working class Americans are accustomed to calibrating their lifestyles to the regular income they earn from work. Upon retiring from the workforce, those workers are challenged to answer the question of how long their accumulated retirement savings balances will support their lifestyle and spending choices. Most retirees have no way of addressing the unknowns of how their investments will perform and how long they will live. The lifetime income guarantees provided by annuities are a safe, effective way to mitigate those risks.

Annuities provide a variety of different income guarantees. MetLife and other annuity providers have innovated to develop annuity products that preserve retirees' access to capital while also providing guaranteed minimum income or withdrawal benefits. These benefits insure against the risks of the market losses that could otherwise completely erode retirement savings while preserving the benefits of financial market investing as a means of mitigating inflation risks. All annuities also offer death benefits equal to purchase payments minus actual withdrawals. The guarantees that can be purchased in an annuity are invaluable to many Americans.² As a fundamental matter of public policy, MetLife believes it is essential that annuity products be freely accessible and available to American workers.

In 2010, in large part because of the growing predominance of defined contribution plans, the Department of Labor, Internal Revenue Service and the Treasury Department issued a request for information regarding lifetime income options for participants and beneficiaries in retirement plans. That RFI included questions about how required minimum distribution rules affect plan sponsors' and participants' interest in, and use of, lifetime income products. In 2012, the IRS took some initial steps towards acting on the input it had received from MetLife and others on this issue by proposing amendments to the relevant tax regulations governing minimum distributions to facilitate the purchase of lifetime income products like deferred annuities. In July of 2014, the U.S. Department of the Treasury issued final regulations

² We have attached a chart summarizing the categories of insurance benefits and guarantees offered in MetLife's various annuity products, and, where meaningful data is available, information concerning the actual usage of these product features (See Attachment A).

exempting assets invested in qualified longevity annuities (QLACs) from required minimum distributions. That regulatory action encourages and fosters access and use of annuity products by defined contribution plan participants and beneficiaries, and MetLife wholly supports it as sound public policy.

When the QLAC regulations were published Mark Iwry, Senior Advisor to the Secretary of the Treasury and Deputy Assistant Secretary for Retirement and Health Policy, stated, "All Americans deserve security in their later years and need effective tools to make the most of their hard-earned savings ... As boomers approach retirement and life expectancies increase, longevity income annuities can be an important option to help Americans plan for retirement and ensure they have a regular stream of income for as long as they live."

MetLife and other leading annuity providers quickly answered the market need for the QLAC products called for by the Treasury Department's guidance by designing and bringing to market a variety of longevity annuity products, many with cost of living guarantees and return of purchase price guarantees similar to the income guarantees and death benefits offered in variable annuities. These QLAC products are designed to be sold in the defined contribution plan and IRA markets.

Unfortunately and inexplicably, the Department's Proposal appears to be pursuing exactly the opposite public policy direction from that of the U.S. Treasury by making it more difficult and risky for financial services companies to make annuity products available to the defined contribution and IRA savers that so clearly need them. The Proposal's impact on lifetime income products is inherently inconsistent with the policy goal of stimulating increased availability and use of these products.

As noted in the Department's original Request For Information Regarding Lifetime Income Options For Participants and Beneficiaries in Retirement Plans dated February 2, 2010, "with the continuing trend away from traditional defined benefit plans to 401(k) defined contribution plans and hybrid plans, including the associated trend away from annuities toward lump sum distributions, employees are not only increasingly responsible for the adequacy of their savings at the time of retirement, but also for ensuring that their savings last through their retirement years and, in many cases, the remaining lifetimes of their spouses and dependents."

MetLife agrees that many workers do not have access to annuities or other forms of guaranteed lifetime income through their employer-sponsored plans. In recent years, the significant shift to defined contribution plans has generally left individuals with choices of a lump sum or series of partial lump sum distributions or to remain invested in the financial

markets. These choices are devoid of guaranteed lifetime income protections. Furthermore, since the average American worker changes jobs multiple times over a working career, the average American has multiple account balance plans where he/she struggles to remember passwords, sort through SPDs, SMMs and fee disclosures to invest their retirement savings. A 2003 article published by the US Bureau of Labor Statistics discussing Pension Equity Plans noted that as of 2002, employees overall had worked for their current employer for an average of 3.7 years. Employees ages 45 to 54 had worked for their current employer an average of 7.6 years. Assuming a working career of 25 to 35 years, the average American worker will have three to five different 401(k) accounts. These workers face inconsistent core investment options and inconsistent descriptions of similarly situated investments across different employer plans and are not always comfortable enough with their current employer or their plan to roll all of their 401(k) money into their current plan.

Consequently, Americans who want to consolidate their retirement assets in one investment vehicle with one overarching investment strategy and consistent descriptions of investment funds as well as income guarantees in retirement, should be able to easily rollover plan funds (often from multiple, confusing sources) to IRAs. Since very few employer-sponsored plans offer annuity distribution options (largely due to unclear and onerous fiduciary responsibilities related to annuity carrier selection), rolling plan balances into annuities held in IRAs is often the only means by which retiring participants are able to secure lifetime income guarantees. Only annuities offered within defined contribution plans or IRAs provide the combination of continued tax deferred growth, investment flexibility coupled with valuable income guarantees, guaranteed death benefits and lifetime income.

MetLife is very concerned that the Proposal will undermine the goal of advancing and promoting the availability and use of QLACs, IRAs and annuities issued to IRAs to guarantee and consolidate the retirement savings of American workers by introducing very onerous, possibly disabling, conditions on the manufacture and sale of annuities, especially to or within an IRA. This results from the Proposal's overly broad definition of fiduciary investment advice, together with the litigation risk that flows from that standard of conduct. The definition both encompasses a wide range of financial marketing and sales activity beyond the sale of annuities and imposes standards of conduct that are fundamentally inconsistent with real world efforts by any insurer to responsibly market and sell its proprietary products. The Proposal imposes standards on advisors seeking to provide lifetime income product information to plan sponsors, plan participants and IRA holders that carry with them unmanageable contingent liabilities in the form of private litigation risk.

Although the Department notes in the Preamble to the Proposal that it intends to allow individuals and firms to act as investment advice fiduciaries, and to continue to receive traditional forms of commissions and compensation through use of the Best Interest Contract Exemption, those good intentions are defeated by the conditions of the exemption itself, which are entirely divorced from any practical considerations and entirely unworkable. The Proposal requires significant revisions to preserve consumer access to annuity products and their concomitant lifetime income guarantees, and to promote the availability and utilization of fiduciary investment advice, and investment education.

MetLife's specific recommendations on changes to the Proposal are as follows:

1. The Definition of Fiduciary as Applied to Investment Advice Should Only Cover Activities Appropriately Regarded as Fiduciary Conduct and Should Not Cover Non-Fiduciary Activity Such As General Marketing, General Sales Activity (e.g., Mass Mailings, Responses to Request for Proposal or Other Inquiries), or Group Presentations To Plan Sponsors, Participants or IRA Holders.

The Proposal states that a person renders "investment advice," for purposes of Section 3(21)(a)(ii) of ERISA and Section 4975(e)(3)(B) of the Code by providing a recommendation pursuant to a written or verbal agreement or understanding that is "individualized" or "specifically directed" to the advice recipient for consideration in making investment or management decisions. The Preamble to the Proposal notes the concern that the investment advice definition "...could sweep in some relationships that are not appropriately regarded as fiduciary in nature" and cites the Proposal's "carve-out" provisions as the solution to that fundamental problem. MetLife agrees that the Department properly identified the problem; the sweeping breadth of the fiduciary definition transforms virtually every communication concerning plan or IRA investments, no matter how mundane, into a fiduciary discussion. Yet the carve-outs the Department has proposed are grossly inadequate for addressing the problem. For the market for financial products and services, including annuity products, to function with any semblance of efficiency, persons who sell products or services cannot be simultaneously required to act as fiduciaries. The two roles are fundamentally inconsistent in our legal system. The financial incentives that naturally accompany marketing and sales activity do not compliment the hallmark of fiduciary status – the disregard of one's own financial and other interests. MetLife firmly supports well-regulated sales and marketing activity, including standards of conduct that prohibit selling parties from proposing products and services that are unsuitable for the customer. Unfortunately, the Department's Proposal would so effectively stifle any financial sales incentives in the context of a transaction involving a plan participant, beneficiary or IRA holder, that it would extinguish this very important economic driver of free commerce.

Given these profound concerns, MetLife believes that the proposed investment advice definition should be revised and clarified as follows:

- a. The proposed investment advice definition should not sweep in non-fiduciary conduct such as mass mailings to plan sponsors, participants, or IRA holders; distribution of marketing materials; and conducting marketing presentations to plan participants, etc., all of which could be deemed to be fiduciary investment advice under the Proposal because they are “specifically directed” to an audience, or via an address on mailings, to the intended recipient.**

Companies need to be free to market and make potential customers aware of their products, and have their sales people make presentations to plan sponsors or participants without giving rise to fiduciary status and the resulting imposition of standards of conduct that prohibit the very financial interests giving rise to the marketing activity in the first place. Left unchanged, the Department’s Proposal will have the effect of severely restricting marketing activities, including responses to requests for information or proposals from customers because of concerns about fiduciary status and liability. MetLife therefore requests that “specifically directed” be removed from the investment advice definition because it is not relevant as to whether a fiduciary relationship has been established. MetLife’s proposed change would allow market participants to deliver marketing and information materials by mail or electronically to potential plan or IRA customers and make presentations to audiences of plan sponsors, participants or IRA holders without having those activities trigger fiduciary status. Removal of the “specifically directed” term would vastly facilitate the provision of information and explanations of products and services to individuals in need of that information, so that they can make informed decisions on attaining retirement security.

- b. Clarification is requested on the meaning of the word “individualized” as provided in the investment advice definition. It is important for MetLife and other manufacturers and sellers of these products to understand the degree of “individualization” that gives rise to fiduciary status. It is MetLife’s view that for investment advice to occur there must be a meeting of the minds and a mutual understanding that an advisory relationship has been formed.**

In the absence of appropriate clarification, the Proposal leaves open the possibility that any marketing material, sales literature, or brochures mailed to plan sponsors, participants or IRA holders that contain an individual’s name could qualify as “individualized” communications subjecting the seller to fiduciary liability. Similarly, presentations at conferences, sales presentations to plan participants, plan sponsors, or IRA holders, could also be deemed to be “individualized” and result in fiduciary status. Without clarification, the term “individualized” could be construed to capture such activities. Left unaddressed, the ambiguity associated with

the term “individualized” could significantly impede a company’s ability to market and inform ERISA plans and IRA holders of annuity products and services, including valuable guarantees and lifetime income options inherent in annuity products.

In addition, MetLife has concerns that the proposed fiduciary investment advice definition would cause any type of conversation or discussion with a plan participant, plan sponsor, or IRA holder, including discussions on plan distribution options and rollovers, to be subject to fiduciary liability concerns. This would significantly limit conversations with clients or prospective clients, and cause limited availability of product and investment information to plan sponsors, participants and IRA holders. Therefore, MetLife requests that a “mutual understanding of an advisory relationship” requirement be incorporated into the advisory definition.

A fiduciary relationship should not be imposed upon two parties who have not consented to that relationship. Instead, there needs to be a reasoned decision by both parties to willingly enter into a fiduciary relationship. This is particularly so in light of the standards of conduct and potential for resulting liability assumed by a fiduciary advisor, which can reasonably be expected to involve an increase in costs to the consumer receiving the fiduciary advice. Consumers should have a choice about paying for the expense of fiduciary advice. Further, without a mutual understanding requirement, it would seem that any client could claim at any time after any reasonable expectation of a continuing fiduciary relationship has ended that the fiduciary relationship nonetheless continues. The imposition of a fiduciary relationship standard on non-consenting parties is fundamentally unfair to both parties and will inevitably result in cost increases for both in light of the significantly increased fiduciary liability and litigation exposure for the advice provider, and will deter sales of products key to retirement security.

- c. The Preamble to the Proposal describes a recommendation as including a “suggestion” that the advice recipient engage in or refrain from taking a particular course of action. MetLife has serious concerns with the use of this term since any communications with plans, plan participants or IRA holders that can reasonably be viewed as a suggestion would be deemed fiduciary investment advice.**

Mere suggestions of potential courses of action are far too ephemeral to form the basis of a fiduciary relationship. Under the Proposal, all marketing and sales material, responses to request for proposals, call center conversations, and all other communications, conversations, and discussions with plan participants or IRA holders, explaining the features and benefits of retirement products, including IRA rollovers, by virtue of containing mere “suggestions” about the purchase of a product could be deemed to give rise to fiduciary advice. This advisory definition is overly broad, and MetLife requests that the Department eliminate the term

“suggestion” from the description of a “recommendation”. Otherwise, this overly broad definition would severely limit the ability of product manufacturers to market and effectively communicate about annuity and retirement products and services, and thus, disadvantage ERISA plans, participants and IRA holders who would have less information available to make informed decisions about obtaining retirement security.

The reliance by the Department on NASD Notice to Members (“NTM”) 01-23 is inapposite. Not only is it outdated, but the NTM provides informal guidance to members regarding the interpretation of “recommendation” for purposes of imposing a suitability obligation on a broker dealer and its associated persons. There is no legal justification for the Department to simply borrow that guidance for the purpose of adopting a rule under ERISA that imposes a far more onerous Best Interest standard on the sale of securities products. In that regard, it is noteworthy that Congress has exempted broker dealers from the fiduciary duty imposed on investment advisors under the Investment Advisers Act of 1940, where their advice is incidental to their services as a broker dealer. See, 15 U.S.C. Section 80b-2(a)(11)(C); *Thomas v. Metropolitan Life Insurance Company*, 631 F.3d 1153 (10th Cir. 2011) (holding that a registered representative of a broker dealer is not subject to a fiduciary duty under the Advisor’s Act). As is discussed in more detail below, although Congress has authorized the Securities and Exchange Commission (“SEC”) to study and determine whether there should be a uniform standard of care for broker dealers and registered investment advisors, no such authority has been granted to the Department. Accordingly, the Department has no basis for bootstrapping the informal guidance of a self-regulatory organization related to its suitability rule for the purpose of imposing fiduciary liability under ERISA.

2. The Counter-Party Exception Should Be Expanded To Cover All 401(k) and Pension Plans, Plan Participants and IRA Holders.

The counter-party exception provides a carve-out from the definition of fiduciary investment advice provided in connection with an arm’s length sale between a large plan investor and the seller. Pursuant to this exception, the seller can make product recommendations and not be deemed a fiduciary advisor as long as certain disclosures and representations are made by the seller including disclosure that the seller should not be relied upon by the prospective buyer as a source of impartial investment advice. The seller is also required to confirm certain information about the plan fiduciary representing the plan. The counter-party exception applies only to transactions involving plans with 100 or more participants, or transactions where the plan fiduciary has responsibility for managing at least \$100 million of plan assets. The Preamble to the Proposal states “the overall purpose of this carve-out is to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm’s length transactions where neither side

assumes that the counterparty to the plan is acting as an impartial trusted advisor, but rather the seller is making representations about the value and benefits of the proposed deals.”

MetLife believes that availability of an adequate counter-party exception is essential as a means of addressing the fundamental over-expansiveness of the Proposal. Because the investment advice definition is so sweepingly broad, and the seller’s exception is so claustrophobically narrow, consumers are effectively left with no option for engaging in transactions other than through a fiduciary advisor. The seller’s carve-out is inappropriately limited to plans with at least 100 participants. Small plans and individuals should be permitted to purchase products with the same understanding that they are dealing with a party that is selling them a product and not giving unbiased advice.

An overriding concern with the counter-party exception is that it is very limited in scope. To facilitate the sale of annuity products, and services, and allow for the enhancement of retirement security, the counter-party exception should be expanded as follows:

a. The counter-party exception should be expanded to cover sales pitches and product sales to plan participants and IRA holders, including sales pitches for IRA rollovers.

Without an appropriately broad counter-party exception, providing sales information to a plan participant or IRA holder or any other sales pitch could be deemed fiduciary investment advice, even if there is no intent, reasonable expectation or request by that plan participant or IRA holder to engage in a fiduciary relationship. Without an appropriately broad counter-party exception, the ability of MetLife and other annuity providers to market and sell annuity products would be severely limited, adversely impacting the ability of plan participants and IRA holders to have access to lifetime income guarantees in retirement.

Without the availability of an appropriate counter-party exception, plan participants would be forced to utilize a fiduciary advisor when selecting an IRA rollover product, which may not be their choice given inevitable additional costs for this fiduciary advisory sales service. Rather, the individual may only want to incur the costs associated with hiring a fiduciary to provide advice at a later point, such as when choosing among investment funds that are available through the IRA. A plan participant or IRA holder should have the freedom to shop the marketplace for an annuity, and the right to determine whether and when to enter into a fiduciary relationship in connection with the annuity purchase. This can only be accomplished by making the counter-party exception available for product sales to plan participants and IRA holders.

MetLife is aware of the Department’s concern regarding the investment capabilities of retail investors such as plan participants and IRA holders. If the counter-party exception is made available and used for product sales to plan participants and IRA holders, to address any

Department retail investor concerns, additional disclosures and safeguards could be required for these types of sales. The Department, in the Preamble to the Proposal, noted concerns that retail investors are not aware whether a seller is acting in a fiduciary capacity. To remedy this, MetLife proposes providing disclosures to plan participants and IRA holders explaining the ramifications of the seller acting in a fiduciary or non-fiduciary capacity during the sales process, and requiring the seller to obtain a signed representation from the participant or IRA holder, by electronic means or otherwise, acknowledging that the seller will act as a non-fiduciary seller pursuant to the counter-party exception, or in an appropriate case, act as a fiduciary for a disclosed fee.

- b. The counter-party exception should apply to all retirement plans regardless of assets under management or the number of participants. No objective data suggests that the fiduciary of a plan with 105 participants is better able to look out for the plan's best interests in an arm's length transaction than a fiduciary of a plan with 95 participants.**

As the Department is aware, the ERISA fiduciary responsibility and prudence rules make no distinction between the fiduciaries of small or large plans. All fiduciaries must comply with the ERISA prudence requirements in purchasing products. If the counter-party exception is not made available for transactions with small plans, then the Department is forcing these plans to utilize a fiduciary advisor when purchasing an annuity product whether or not the plan wants to incur the additional cost of a fiduciary advisor during the sales process.

Alternatively, the Department should recognize that even sophisticated employers can accumulate, through merger activity and reductions in benefit programs, pockets of small "frozen" benefit plans. An example is that MetLife has a very large active retirement plan for US employees. However, it also has a very small frozen defined benefit plan sponsored by a company purchased as a subsidiary over 20 years ago. At the present time, that subsidiary plan has less than 100 participants. It does not change the fact that MetLife is a sophisticated employer very familiar with ERISA plans and fiduciary responsibility.

It is incongruous for large employers to be subject to counter-party for some sales and subject to much more complex PTCEs for others. It will also add to customer confusion if the same customer is treated differently, especially since product sales related to the smaller plans of a large customer are often an add-on or subsequent transaction to the purchase for the larger plan.

MetLife asks that at minimum the Department expand the counter-party exception to include employers with over 5,000 US employees (regardless of whether 100 participate in the plan making the purchase) or a public company with more than \$100 million in assets under management or with over \$100 million in revenue as indicated in the company's most recent

financial statements or public website. This expansion is a necessary supplement to the current 100 participants or \$100 million in plan assets standard.

- c. The Department should confirm that the counter-party exception would be available for individual sales of annuity products whether through an independent broker or agent or directly by the sales force of the insurer.**

Also, the counter-party exception should be available when the plan is represented by a consultant or other advisor. In these circumstances, the financial company and its salespeople are not dealing directly with the plan. The plan in these instances has chosen to hire a broker or consultant who is serving as an independent advisor to the plan. When a plan is independently represented by a broker or consultant, there is no reason for MetLife or its salespeople to act as fiduciaries to the plan. This is true regardless of the size of the plan customer. Consequently, the counter-party exception should be expanded to include cases where the customer is independently represented.

It is important to note that the scope of the counter-party exception is also not clear. The Department should confirm that when the counter-party exception is successfully utilized during an annuity product sale to a plan, “recommendations” during the sales process would not cause the financial company to become an investment advice fiduciary for purposes of using PTCE 84-24, and the financial company would not have to comply with the “Impartial Conduct Standards” of Section II of PTCE 84-24.

- d. The counter-party exception should not be limited to the sale of products but should be expanded to cover the sale of investment management and advisory services.**

If a financial company or its salespeople are selling management or advisory services, and if recommendations are made during the sales process, the company should be able to use the counter-party exception, and not be deemed an ERISA fiduciary. There is no basis under the Proposal for differentiating between recommending an investment product and recommending an investment manager or advisor. If the counter-party exception is utilized, the recommendations of investment managers or advisors would not be deemed to be fiduciary investment advice.

- e. In order to ensure proper interpretation and application of the rule, the Department should clarify that a person or entity is only an acknowledged fiduciary regarding the specific assets involved in the transaction and could still utilize the counter-party, and other exceptions, with respect to other assets.**

The counter-party exception and the other carve-outs from the proposed definition of fiduciary investment advice are unavailable for service or product providers who represent or

acknowledge that they are already acting as fiduciaries. Since a person is only a fiduciary “to the extent” that he or she performs the functions of fiduciary, the Department should make clear that a person who has acknowledged fiduciary status with respect to a recommended product or service is not precluded from availing himself of any exception or exemption that could be available with respect to any activity outside the parameters of the acknowledged fiduciary relationship.

Conversely, the Department should clarify that if a person acquired ERISA fiduciary status for purposes of a particular recommendation, the scope of that person’s fiduciary responsibility is limited to that one particular recommendation and does not carry over to other potential facets of the relationship. For example, pursuant to the proposed fiduciary definition, if a person or entity becomes an ERISA fiduciary by recommending an annuity product, this person or entity should only be a fiduciary regarding the specific product recommendation, and this fiduciary responsibility and taint should not carry over to post-sale activity or functions, such as choosing the investment funds wrapped by the product, or deciding when to sell the product (assuming, of course, that no post-sale activities would separately trigger fiduciary status).

- f. In order to allow established and highly-rated insurers, such as MetLife, to continue to assess the impact of the proposed regulation, clarity is needed on time periods within which a customer must act on a recommendation in order for the person/firm who provided the recommendation to be considered a fiduciary.**

Much investment-related information is highly dependent on current market conditions and can/would change as financial markets fluctuate. Quotes for products and the advisability of investment recommendations are very time sensitive. An investment recommendation that is in the recipient’s best interest at the time it is made may subsequently go “stale” as market conditions change. It would be an inappropriate and unduly punitive result if the salesperson or company who made the recommendation were to continue to be responsible as a fiduciary for recommendations that are not timely acted upon. Fiduciary liability for a recommended purchase or sale of a security or financial product should expire if the recommendation is not acted upon within a reasonable period of time after the recommendation is made. Clear disclosure by the recommending salesperson or company of the expiration date of the advice should also be permitted as a means of establishing an end date.

3. The Department Should Clarify That an Insurer Can Sell its Own Products Without Raising Conflict of Interest Concerns.

- a. MetLife has significant concerns that the Proposal appears to prohibit the sale by MetLife’s career agents of any proprietary products even if the commissions or**

compensation paid to these agents are the same as commissions paid for the sale of non-proprietary products sold by MetLife career agents.

The Department should clarify that as long as the compensation paid to the agent recommending and selling the product is neutral across products of the same type, then proprietary product sales would not, in and of themselves, be regarded as giving rise to a material conflict of interest. The BIC exemption needs to be specific on this point to allow for proprietary sales activity when commissions across a product type are neutral. Similarly, if proprietary products are the only products made available to certain customers, and disclosure of that fact is made to the customer, as long as the sales person is compensation neutral across proprietary products of the same type, then this sale should not be deemed to cause a conflict of interest and should be permissible.

Without clarifying that a company can sell its own products, the proposed regulation would have the effect of incenting insurers to manufacture but not directly distribute their own financial products. Like many of its peer companies, MetLife distributes annuity products through a “career agent” distribution force. In contrast to independent insurance agents, MetLife salespeople value their individual customer relationships, which they are trained to regard as paramount. Loyalty toward serving the needs of the individual customer through MetLife’s robust proprietary suite of products is part of the career agent’s mission. Of utmost concern is providing customers with products that suit the customer and perform well over the long-term. Only through selling products that fit their customer’s needs can/will they continue to receive business and referrals. MetLife has reinforced this message by having customer-centricity as one of the four foundational pillars of our corporate strategy. Additionally, putting customers first is one of MetLife’s core values. Consequently, salespeople who are revenue neutral on product sales to plans, plan participants, and IRA holders, should be able to sell both the annuity products of competitors (when and as available), and MetLife’s products. In this way, they are free to sell their customers a wide array of products based upon the product features that suit the investment goals of the client.

b. MetLife has concerns regarding the requirement that a financial company must be revenue neutral when making sales to avoid conflict of interest status.

Guarantee features within annuities represent very real risk shifting that have a financial cost to the company issuing the guarantees. These financial costs are reflected in capital requirements on these products which require financial companies to set aside considerable amounts of valuable capital that could otherwise be profitably deployed to backstop the promises made by the product. In our experience, these capital outlays are quite substantial in the first three years of a product and can exceed the cash flow into the products from the customer. Without

surrender charges and administrative fees, the product would have a negative internal rate of return and would not be a financially viable deployment of enterprise capital for a period between three to five years. Consequently, it is not possible to achieve revenue neutrality between IRAs that are account based brokerage products (requiring little to no outlay of internal company capital), and annuities. Likewise, even among annuities, the internal cost of an immediate annuity with no income protection guarantee and a deferred annuity with those guarantees are not the same to the issuing company. As noted above in (a), as long as salespersons are compensation neutral, there is no real bias in favor of selling proprietary products and assuming one exists even if sales compensation is neutral is unduly punitive to the companies that manufacture IRAs and variable annuities. This demonstrates the importance for the Department to either clarify in the Proposed Regulation, or offer an exemption recognizing, that proprietary sales are not an inherent conflict and removing any reference or requirement of revenue neutrality for the selling entity.

In the absence of the requested clarifications, a salesperson's ability to offer "the right" product with "the right" guarantee features for their clients would be unduly hampered to the disadvantage of plans, participants, and IRA holders who utilize these products to take advantage of their unique income guarantees and lifetime income features. When ERISA was enacted in 1974, one of the key objectives of Congress was to protect the rights and benefits of plan participants and beneficiaries but not to inhibit or unduly burden the business and sales activities of insurance companies and other financial services firms. The Proposal will, however, restrict and impede the sales of a company's own products in ways that are unfair and unduly burdensome to the financial services industry and its customers.

Additionally, without the requested clarification, financial services companies could be forced to restructure. For example, a company that manufactures its own products and has its own sales force could be forced to exit one or the other of these businesses, because maintaining both could result in a disabling level of ERISA compliance risk than engaging in manufacturing or sales individually. Forcing financial institutions to restructure their business operations will limit the availability and use of annuity products and increase the acquisition costs to plans, plan participants and IRA holders, without serving any clear consumer need. Our experience indicates that salespersons value individual relationships with their clients and once products are compensation neutral there is no bias that would outweigh the desire to provide clients with what is suitable for that particular client.

4. The Proposal Should Not Apply to Insurance Contract Sales to Welfare Benefit Plans.

The Proposed Regulation should not apply to insurance contract sales to welfare benefit plans. The practical need or application of this proposed rule to welfare benefit plans and their

fiduciaries seems not to have been considered. MetLife therefore asks the Department to clarify that contract sales to or through welfare benefit plans are out of scope of the Proposal.

While the Proposal is clearly directed at, and applicable to, ERISA retirement plans, plan participants, and IRAs, the Proposal does not appear to analyze or even consider sales to welfare benefit plans. This is evidenced by the Department's economic impact study which was exclusively devoted to retirement plans and IRAs, but did not consider or even mention welfare benefit plans. Further, while the proposed PTCEs and the carve-outs, such as the Best Interest Contract Exemption and the counter-party exception, were clearly designed to apply to retirement plans and IRAs, it is our view that they were not drafted with welfare benefit plans in mind, and have no practical application to welfare benefit plans. For example, one of the provisions of the counter-party exception requires the seller to have knowledge of, or reasonably believe, that the fiduciary representing the plan has responsibility for managing at least \$100 million in plan assets. However, this is a concept that applies almost exclusively to retirement plans. As the Department is aware, there is no requirement to fund welfare benefit obligations and there are severe penalties for over funding that, with IRS maximums, tend to suppress funding of these plans. These welfare benefit plans are offered by the same type of sophisticated customers that sponsor the pension plans that would fit within the counter-party or large plan carve-outs or exemptions. Furthermore, unlike pension plans, where eligibility exclusions are limited by law, it is common for welfare benefit plans offered to an existing group of participants to be phased out or grandfathered and a new or different version of the benefit to be offered to newly hired employees. Consequently, even achieving 100 participants for old, frozen welfare arrangements can be a challenge. However, the number of participants or the amount of plan assets may not be tied to or reflective of the financial sophistication of the employer.

In fact, if the proposal were applied as written to welfare benefit product sales, then MetLife would be in the absurd position of treating the exact same sophisticated corporate customer very differently on different product sales. For example, to assist the customer with their pension funding MetLife would be exchanging a very simple set of representations and warranties under the counter-party carve out for the sale of an annuity to their pension plan. However, to sell the same customer group term life for a closed block of their less than 100 retiree population MetLife would be required to offer a complex array of representations and be held to a completely different standard of care. This result would be confusing to customers and serves no consumer purpose. The sophistication of the customer and their fiduciary knowledge would not be different.

It should also be noted that the fee arrangements, marketing practices, sales and distribution, and the types of products used by financial companies for sales to welfare plans are

fundamentally different from those used in the pension plan market and therefore warrant different treatment and requirements. To readily apply the Proposal to sales to welfare benefit plans without a thorough study or analysis, and without considering welfare benefit plans in the Department's economic impact study could result in unintended negative consequences to welfare benefit plans, and participants and beneficiaries. This could include limiting the types and availability of insurance products sold to welfare benefit plans, as well as increased administrative and insurance product costs passed on to those plans and participants.

While pension plans have been the subject of considerable scrutiny and concerns, few such concerns have been voiced with respect to investment advice and welfare plans. Any perceived benefit of having the Proposal apply to the sale of insurance contracts to welfare benefit plans would be outweighed by the danger of the unintended consequences and costs borne by welfare benefit plans and participants given the lack of time and attention given to this matter by the Department.

Any proposed regulation should not even be considered without a comprehensive analysis and a thorough economic impact study by the Department. There are many different types and variations of welfare benefit plans offered by employers, and a broad range and variety of insurance contracts made available to these plans. Many of these plans and arrangements are fairly complex, and it would require a significant amount of time and resources for the Department to truly understand these plans, products and arrangements.

While MetLife feels strongly that the Department should defer application of this, or any other regulation on investment advice to welfare benefit plans until appropriate impact analysis is performed, MetLife offers the following requests for modifications if the current Proposal is to apply to welfare benefit plans in situations where there is an accumulation component in the insurance policy.

MetLife offers Group Universal Life (GUL) and Group Variable Universal Life (GVUL) as supplemental coverage to an employer's basic group term life plan. By enrolling in supplemental coverage, an employee can increase the amount of life coverage they have through their employer. An employee or participant in the employer's group life plan has to elect, through payroll deduction, to have amounts above the premium for their supplemental coverage deducted from their pay in order to accumulate cash value in the supplemental GUL or GVUL program. As a cumulative average, group life plan participants hold approximately \$4,000 or less in their GUL/GVUL supplemental coverage. Cash value in the supplemental GUL/GVUL grows tax deferred and is automatically used to pay the premiums on the supplemental coverage as/when the employee is not receiving regular pay checks from the employer due to disability, FMLA or any other type of reduced-pay or unpaid leave. It seems that employees who choose to accumulate cash value in their GUL/GVUL do so because they do

not want their supplemental life coverage to lapse during a disability or leave period. While GUL/GVUL can be sold to individuals as a substantial investment opportunity, those are generally individual sales made outside of the context of an ERISA plan. If companies are forced to comply with PTCEs in order to sell supplemental GUL/GVUL coverage, it would reduce the cases where GUL/GVUL were offered as a supplement to an employer group life plan.

Offering GUL/GVUL as a supplemental coverage to an employer group life plan encourages education about and enrollment in additional life coverage. MetLife's statistics do not show that group life plan participants are using supplemental GUL/GVUL coverage as an investment to any meaningful degree. MetLife requests that, if the Department is going to apply the Proposal to welfare benefit plans, GUL/GVUL coverage offered as supplemental coverage to an employer group life plan where average cash value accumulation is \$15,000 or less (with an inflationary factor going forward) be carved out of application of the Proposal. This would allow employees of all income ranges, enrolled in varying amounts of supplemental life coverage, to accumulate a modest amount that would cover premiums in case they cannot actively remain at work.

MetLife also offers employers that have group life coverage with MetLife reserves that they can be deposited with MetLife to ensure premium stabilization and in some cases, to guarantee the payment of group liabilities. The products that guarantee group life coverage generally apply only to retiree groups that are closed. In exchange for a stated premium amount MetLife will guarantee that the life liability will be paid in full. Once the guaranteed contract is purchased there is no cash value that can be distributed to the customer. It is MetLife's position that this is not an "investment" but is purchasing of guaranteed insurance coverage for a closed group. MetLife requests that the Department clarify that arrangements like this are excluded from any application of the Proposal to welfare benefit plans.

Likewise, an employer can set up a life insurance funding agreement for a group life plan that is not closed. These pre-funding agreements are credited a fixed rate of return and are used to pay life plan premiums and in some cases, pay excess life claims directly. Once again, MetLife does not view this as an "investment" but rather as a fixed rate of return on assets specifically, contractually set aside to secure life plan premiums. MetLife requests that the Department clarify that arrangements like this are excluded from any application of the Proposal to welfare benefit plans. Finally, if the Proposal is going to apply to welfare benefit plans, which were not considered "in scope" by any part of the industry under the current investment advice definition, then we specifically request that any and all products sold to welfare benefit plans prior to the final applicability date of the regulations and modified PTCEs be excluded from application of the Proposal provided no current and on-going advice is being rendered on investment in the existing contract, modification or disposal of the existing contract. We once

again remind the Department that the economic impact analysis was devoid of any mention of welfare benefit plans and certainly did not anticipate the type of outreach, education, communication and expense that would be incurred by companies if the Proposal applied to these plans and existing contracts are not fully grandfathered.

5. The Department Should Incorporate All the Provisions of I.B. 96-1 Into the Investment Education Carve-out and Thus Permit the Identification of Specific Investment Alternatives In Connection With Investment Education.

The Proposal provides a carve-out from investment adviser fiduciary status for the providing of investment education to plans, plan participants, and IRAs. Currently, the Department's Information Bulletin (I.B.) 96-1 is relied upon to provide investment education to plan participants, and it has been effectively utilized for nearly 20 years to help plan participants invest plan assets and prepare for a financially secure retirement. One of the most beneficial features of I.B. 96-1 is that it allows for informing plan participants about specific investment alternatives in connection with asset allocation and requires an accompanying statement indicating that other investment alternatives with similar risk and return characteristics may be available under the plan, and by disclosing where a plan participant can obtain information about those alternatives.

The Department proposes to eliminate this provision in the investment education carve-out of the Proposal, and require that any asset allocation models and interactive investment materials used to educate retirement investors refrain from identifying any specific investment products available under the plan or IRA. This proposed change will drastically reduce the value and effectiveness of investment education and would hinder plan participants and IRA holders who typically request information about specific investment alternatives available through the plan or IRA. If salespeople cannot identify and discuss specific investments, investment education will be limited to hypothetical and abstract conversations about investment theory that would not be beneficial. *Further, if a plan offers an annuity distribution option, that option must be explained to the participant. It is not practical for a participant to be educated about the plan's annuity distribution option without mention of the actual annuity product.*

MetLife supports the investment education carve-out provision which makes clear that investment education about lifetime income is permissible including education about annuitization and other forms of lifetime income payment options as well as estimating a retirement income stream. These educational provisions will assist plan participants in preparing for a financially secure retirement through utilization of lifetime income options. To further assist plan participants and IRA holders regarding lifetime income or any annuity product, the salesperson educating the plan participant or IRA holder must be able to mention and discuss the specific annuity product offered as an investment option. Consequently, the

I.B. 96-1 provision that permits the identification of investment alternatives should be included in the investment education carve-out of the Proposal.

6. The Platform Provider Carve-out Should Cover Variable Annuity Products and be Further Expanded. The Platform Provider Carve-out Should be Available to all Accounts Including Accounts of Plan Participants and Holders of Individual Retirement Accounts and Individual Retirement Annuities.

The Proposal provides a carve-out for persons or entities that market and make available a “platform or similar mechanism” from which a plan fiduciary may select and monitor investment alternatives that are made available to plan participants. More specifically, making available these platforms without regard to the “individualized needs” of the plan or participants would not be deemed fiduciary investment advice as long as the platform provider discloses that it is not providing impartial investment advice or advice in a fiduciary capacity.

Many ERISA plans use individual and group variable annuity products as a means to provide access to investment options for participants to allocate their account balances. Annuity contracts are the only viable and appropriate alternative to trusts holding plan assets and plan investments. Specifically annuity contracts do not pose the same Unrelated Business Taxable Income or “UBTI” risk to plans, are competitive in fees to independent trusts, offer an array of investment options and include the ability to create a lifetime income stream from account balances. MetLife requests that the Department clarify that all group or individual annuities that make available a broad range of investment options for the plan’s fiduciary to select from when designating plan investment alternatives would themselves qualify as a “platform” for purposes of this carve-out from the provision of fiduciary advice. Without this confirmation, the proposal would disadvantage companies that market and make available variable annuity products to fund retirement plans. The Department should also confirm that the platform exception applies even if the platform and underlying investments are all proprietary products and investments. MetLife also requests the Department to clarify if a minimum amount of funds or investment products must be offered on a platform to qualify for this carve-out, and whether platforms designed to provide distribution options such as life-time income, would also qualify.

The platform provider carve-out should also be available to all accounts including accounts of plan participants and holders of individual retirement accounts and individual retirement annuities. Investing in a variable annuity allows access to a variety of different investments; in this sense, a variable annuity product is as much a platform as is a brokerage account or trust offering. As discussed above, the additional value of investing through an annuity contract is found in the insurance features these contracts offer such as income benefits and lifetime income options that are not available in brokerage account or trust products. Consequently,

the same carve-outs or exemptions should be offered. The Proposal limits the platform exception to employee benefit plans described in Section 3(3) of ERISA. MetLife requests that the platform provider carve-out be amended to also apply to any plan described in IRC Section 4975(e)(1).

Finally, the Proposal should clarify what it means to make platforms available without regard to the “individualized needs” of the plan and participants. If the funds offered through the platform target a certain market segment, then this segment approach should not be treated as taking into account the individualized needs of the plan or participants. Without this clarification, even simple target date maturity funds (which align risk with age and target retirement date) could be deemed “individualized”.

7. The Department Should Clarify That Valuation As Part of The Investment Advice Definition Does Not Include Informational Reporting Activities and Pricing Valuations.

Under the Proposal, providing an appraisal, fairness opinion, or “similar statement” whether verbal or written concerning the value of securities or other property would trigger fiduciary status as “investment advice” if provided in connection with a “specific transaction or transactions” involving the acquisition, disposition, or exchange of securities or other property by a plan or IRA. The phrases “similar statement” and “specific transaction or transactions” are ambiguous and raise the concern that some routine insurance company customer reports, including customer statements, could be viewed as fiduciary investment advice if the customer subsequently relies on those reports for purposes of engaging in a transaction.

For example, With respect to variable annuities, Securities and Exchange Act Rule 10b-10 requires confirmation by a broker dealer of any securities transaction. Depending on the circumstances, these confirmations can take the form of immediate, monthly, quarterly or annual statements. Even when not required by Rule 10b-10, it is common industry practice to provide variable annuity customers with periodic statements of their account. These account statements, even when provided more frequently than securities law would technically require, should not be considered valuations that constitute fiduciary advice. Likewise, plan customers who invest in any insurance company separate account may receive monthly asset valuations. The report is simply intended for informational purposes and the report should not be deemed a valuation covered by this fiduciary rule. These reports are used to assist plan fiduciaries in benchmarking the performance of the separate account at appropriate intervals and are therefore helpful to customers. Also, in order to purchase an annuity contract as a funding or investment vehicle for a pension plan, the issuer and the plan sponsor must come to agreement on the valuation of the overall assets and liabilities, which will often be memorialized in the contract. This is not intended to be an official valuation of the plan but is exclusively for pricing purposes.

Some MetLife customers have purchased an annuity contract as a funding vehicle by using non-publicly traded assets such as private placements or interests in private equity instead of cash. To determine the credit a plan customer would receive for the in-kind portion of the purchase price, the insurer must value the asset. There is no reason for the insurer to be a fiduciary because of the valuation involved in determining pricing or credit toward pricing; as this is clearly a negotiated transaction where the insurer is acting in its own interest in determining product price and/or the credit amount. If MetLife did not share valuations it performs in the context of a group annuity purchase, the true plan fiduciaries would be unable to appropriately evaluate the transaction and make an informed or prudent decision on the purchase. MetLife feels strongly that sharing this information with its customers is both appropriate and necessary and should not itself trigger fiduciary status.

Similarly, account values can be provided for IRA owners considering converting an annuity to a Roth IRA. Also, an IRA owner, who is considering a withdrawal from a variable annuity, may ask the insurer to calculate the effect of the withdrawal on the annuity's guaranteed lifetime withdrawal or death benefit. Further, an IRA owner that must begin receiving required minimum distributions may want to know the value of enhanced death benefits or other features that must be included in the "value" of the annuity for purposes of the minimum distribution rules.

The Department should clarify that these types of routine valuations are not the valuation covered under the investment advice definition, and are not being provided in connection with a "specific transaction or transactions" as contemplated by the Proposal. Further, it should be noted that in all these situations, the insurer is not "representing" the annuity owner. Alternatively, the Department can craft a broad carve-out to cover and exempt all these types of valuation transactions from the Proposal. Absent this clarification, potential legal liability will cause insurers to stop providing customers helpful valuation information that assists them to independently determine whether to hold or exit a product or whether the purchase price they are being quoted appropriately takes into account the value of certain assets or correctly values liabilities.

C. Comments on the Best Interest Contract ("BIC") Exemption.

The Department noted in the Preamble to the Proposal that it sought to preserve beneficial business models for delivery of investment advice by proposing the Best Interest Contract Exemption ("BIC Exemption") that would "broadly permit firms to continue customary fee and compensation practices." While MetLife applauds the goal of permitting the continuation of common fee and compensation practices, the BIC Exemption is unfortunately not a viable means of doing so because the BIC Exemption is unworkable in its current form; insurers will not be able to rely on it unless it is significantly revised.

Notwithstanding its stated goal of permitting the continuation of common fee and compensation practices, the Department's proposal will in fact require changes in compensation practices that will require advisors and their related financial institutions to make significant changes to how products and services are structured and distributed. This is due to the fact that the only way to avoid significant changes to compensation practices is to comply with the BIC Exemption, which as noted above, is unworkable. The Proposal would require the compensation and commission payments to the insurer's salespeople, brokers of affiliated broker dealers, and independent agents to be neutral, meaning that the compensation and commission payments cannot vary based on the investment advice provided to the plan, plan participant, and IRA holders. Thus, the Proposal effectively imposes a fee-based compensation scheme on advisors if they cannot comply with BIC. That result is inconsistent with the Department's objective to promote guaranteed life time income products, such as annuities.

Fee-based advisors historically have avoided selling annuities. That is understandable when one considers that funds invested in an annuity are not assets under management subject to the advisor's fee. Therefore, one would expect that, in a fee-based system, annuity sales would decrease, not increase. Moreover, any change to the compensation structure for annuities will require product changes and filings with the SEC and state insurance departments. Under those circumstances, MetLife and other financial services companies will have to consider discontinuing the manufacture of certain products and the manufacture and distribution of annuities through affiliated sales channels. Therefore, contrary to the Department's stated intention, if MetLife and other insurers are unable to comply with the BIC exemption, consumers' access to investment advice and guaranteed income products will likely decline significantly. MetLife urges the Department to provide an exemption that would broadly permit financial services companies to continue common fee and compensation practices and thus avoid disruptions in advisory services and annuity product sales, which would likely result in increased costs to plans and IRAs, and the availability of fewer investment products and services.

Additional BIC Exemption related comments are as follows:

1. Disclosures

- a. **Section III of the BIC exemption requires an unprecedented amount of disclosures including the total cost to the investor of investing in recommended assets for 1, 5, and 10 year periods expressed as a dollar amount, numerous and extensive annual disclosures, and a web page that requires disclosure of direct and indirect material compensation payable to the advisor, firm and affiliates for services provided to each**

asset that a plan, plan participant, or IRA holder could purchase, hold, or sell through the advisor or affiliates within the last 365 days.

MetLife has concerns that this massive amount of information is of dubious value to the participant or IRA holder, and would be prohibitively costly to produce. For many companies, creating the aforementioned disclosure would require significant IT programming and tens of thousands of man-hours because current systems do not track cost in the manner required and/or do not aggregate or display this information in a way suitable for public disclosure. Further, certain of the disclosures, such as the total cost to the investor over 1, 5, and 10 year periods expressed as a dollar amount may make sense for mutual funds that have easily determinable expense ratios, but are much more problematic for annuity products that have embedded cost and expenses associated with guarantee features that are very different from account based mutual fund products. Furthermore, since certain costs within an annuity product are not triggered unless the contract holder takes certain actions, it is not at all clear how or when contingent costs would, for purposes of calculating costs, be deemed to be incurred.

The Department has already issued comprehensive disclosure requirements under ERISA Section 408(b)(2) and the Department's Section 404a-5 regulations. Those disclosure rules were recently finalized and implemented following years of public comment and discourse. To comply with additional further layers of disclosures on top of these existing disclosure regimes would require enormous additional costs and expenses. A far better approach would be for the Department to require firms to utilize the existing and comprehensive disclosure systems already in place under ERISA Section 408(b)(2) and/or the Section 404a-5 regulations to provide BIC investors with comprehensive investment, and direct and indirect fee information. Firms have already established and set up expensive systems and procedures pursuant to the current plan and participant disclosure rules. Compliance costs could be significantly reduced by using existing reporting systems. MetLife is willing to work with the Department to determine what specific 408(b)(2) and/or 404a-5 disclosures would replace the BIC disclosures and how the disclosures would be tailored to IRAs. Further, to the extent that SEC or state insurance laws already require disclosures to plans, participants or IRA holders, they should not be duplicated by BIC.

Relatedly, MetLife agrees with and specifically incorporates by reference the Sections of the ACLI's comment letter on the Proposal discussing harmonization of BIC with other disclosure requirements.

If the proposed BIC disclosure requirements remain unchanged, complying with the BIC disclosures would be cost prohibitive. Financial services firms would either not utilize the exemption, or make it available only to customers with significant assets available for

investment. This would exclude small to mid-size plans, plan participants and low to mid-size IRA holders from being offered products that must utilize the exemption in light of the high administrative, compliance, disclosure and litigation costs for these customers.

2. MetLife Has the Following Concerns with the BIC Exemption Requirement that a Written Contract be Entered into With Each Plan, Plan Participant and IRA Holder.

- a. Requiring every customer (including individual customers) to enter into a legally binding contract *before* they can even determine if they want to do business with a financial services company or its advisor is impractical.**

The BIC Exemption requires consumers to sign a legally binding contract before salespeople can describe products, their benefits and their features, which the Proposal characterizes as a “recommendation”. Plans and corporations that sponsor plans have governance protocols limiting the individuals who can sign contracts on behalf of these entities. Individuals who can execute binding contracts are often at a relatively high level within organizations. This is best practice from a governance perspective. That high level individual in relationship to the plan or the employer/sponsor may not be the same person meeting with various vendors to consider products and services that may be offered to the Plan, its participants or beneficiaries. The BIC Exemption presently would require that if an individual IRA holder seeks proposals from five different sources he or she would need to execute contracts with each of them. As a practical matter, our customers do not, and will not do business this way even if companies offer these contracts. Also, given the overly broad proposed definition of fiduciary investment advice, most sales pitches and conversations with plan sponsors, participants and IRA holders will likely be deemed to be investment advice, even if they are made to potential buyers comparison shopping for an annuity and therefore unlikely even to result in a sale. Requiring insurers to enter into a detailed contract, with every potential plan or IRA customer prior to any product discussion or recommendation is unworkable. MetLife therefore requests the BIC Exemption be revised to require a written contract be entered into through customer acknowledgement or an electronic signature, after the product recommendation is made and the investor acts upon the recommendation by purchasing the product within a reasonably short period of time after the recommendation.

- b. Small non participant-directed plans (with fewer than 100 participants), plan participants and beneficiaries already have civil enforcement rights under ERISA that are sufficient to allow them to enforce ERISA fiduciary violations and should not be compelled to enter into contracts for purposes of acquiring additional state law remedies.**

Given the absence of other exemptive relief, the Proposal would force service and product providers selling to small non-participant directed plans to use the BIC Exemption and issue an individual contract providing state law enforcement rights. This is unduly burdensome, requires undue administration and is arguably preempted by ERISA and its exclusive remedies. Further, we question the authority of the Department to compel grants of state contractual rights to ERISA plans and IRAs. The required use of the BIC Exemption for sales or recommendations to small plans undermines ERISA and ERISA preemption which have served ERISA plans, participants and those who serve as fiduciaries to them for well over 40 years. The Department should not re-write ERISA remedies or 40 years of related case law. Likewise, Congress gave ERISA authority over IRAs that are part of a pension program sponsored by an employer (See Sections 4(a) and 3(3) of ERISA). The Department may not re-write congressional intent by requiring the extension of state contractual enforcement rights to those plans and/or arrangements that already have remedies under ERISA.

- c. The exemption states that contracts offered under the BIC Exemption cannot contain “A provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution.”**

In discussing the BIC exemption, the Preamble to the Proposal, notes that “As proposed, this section would not affect the ability of a Financial Institution or Adviser, and a Retirement Investor, to enter into a pre-dispute binding arbitration agreement with respect to individual contract claims.” The Department’s intent is not clear given the apparent contradiction between the Preamble’s assurance that parties can choose mandatory arbitration and the above-cited prohibition against any waiver of litigation rights. MetLife refers the Department to AT&T Mobility v. Concepcion, 131 S.Ct. 1740, (2011) for the premise that the Federal Arbitration Act (FAA) specifically allows parties to a contract to utilize arbitration clauses as alternatives to class actions. In that case the Supreme Court found that California law prohibiting limits on class actions to be preempted by the FAA.

For the same reason that the State of California could not prohibit arbitration clauses in all contracts, the Department does not have the authority to limit arbitration clauses to those issues that cannot be certified as class actions.

- d. The class actions favored under BIC exemption contracts for individual resolution of Best Interest compliance issues will not benefit consumers and will destroy shareholder value.**

In 2013, Mayer Brown, LLP undertook a study of class action litigation. The study examined 148 consumer and employee class action lawsuits filed in 2009. Mayer Brown found that “the vast majority of cases produced *no benefits to most members of the putative class*.” Additionally, the study noted that “thirty five percent of the class actions examined settled on an individual basis, meaning that the individually named plaintiff and the lawyers received settlement proceeds but the class members received nothing.” The class actions that settled on a class basis also had “little or no benefit for class members ... what is more, few class members ever even see those paltry benefits particularly in consumer class actions.” According to the study, “The bottom line: The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can and do enrich attorneys.” A recent study by Navigant Consulting and the US Chamber Institute for Legal Reform looks at securities class action litigation. The study details destruction of shareholder value from the filing of these lawsuits noting, “our study calculates the total shareholder wealth loss as a result of securities class actions lawsuit announcements to be at least \$701 billion compared to the \$109 billion in aggregate settlement dollars (before plaintiff attorneys get their cut of 18% on average).” The summary notes “our overall conclusion is that private securities class actions significantly harm investors and the economy and they do not provide an efficient mechanism to compensate victims of alleged wrongdoing. Instead they further harm the alleged victims (as well as other innocent shareholders).” The Department’s presumption that class actions will provide appropriate remedies and redress to individual consumers is untrue and has proven untrue across securities and consumer class actions. Furthermore, innocent shareholders of a wide variety of financial services companies impacted by the Department’s proposal can and may suffer serious financial harm. In light of these facts, MetLife again asks the Department to remove the individual contract requirement in the BIC Exemption. If the Department has concerns about not being able to bring appropriate enforcement actions to serve IRA owners when those IRAs are not part of an employer sponsored plan, then MetLife would favor enhancing the Departments enforcement capabilities and expanding ERISA rights for this group in lieu of the BIC exemption, which will achieve no valid consumer purpose.

One important modification would be to eliminate the contract requirement in the BIC Exemption and instead allow disclosures consistent with those provided for under PTCE 84-24 to be set forth in a document provided to customers. MetLife also requests clarification that the representations are appropriately provided if delivered to the prospective client, electronically or otherwise, and the sufficiency of the representations is agreed to by the client through negative consent. Alternatively, if the Department insists on requiring a contract, which requirement will likely be challenged by financial institutions at a later date, MetLife requests that the Department abandon any attempt to limit the availability of mandatory arbitration for dispute resolution and that at minimum the Department allow the contract to be

delivered in paper or electronically to the client with no need for bi-lateral execution but rather to be effective upon delivery through negative consent. To utilize negative consent, the contract would state that if the client does not object to the contract terms within a reasonable period of time, e.g., ten days, then the contract would automatically enter into binding effect.

If, however, the Department insists on a bilateral, executed contract, MetLife requests that the Department clarify which corporate party will execute the contract. In cases of non-proprietary products or sales through an affiliate, there can be numerous potential companies who could sign the BIC contract. Since the recommendation of the product and the representations made during sale are the focus and triggers for fiduciary status under the Proposal, MetLife believes that the most appropriate party to execute any contract under BIC is the "firm with primary responsibility for oversight of the salesperson who placed the sale." MetLife specifically requests that the language quoted immediately above be inserted into the BIC PTCE in the first paragraph of Section II which describes the contract requirement. The phrase in quotes here should modify the term "Financial Institution" as it appears in that paragraph.

3. The proposal should make clear that it does not have retroactive effect on past transactions or relationships already in place. It would not be fair or appropriate to require financial institutions to re-paper and re-negotiate existing contracts relying upon PTCE 84-24 as it existed prior to modification by this proposal.

Since the Department has never before attempted to regulate IRA sales or rollovers and given the sheer volume of contracts in existence, it would be unduly burdensome to require the BIC Exemption contracts with every preexisting IRA holder. Additionally, as explained earlier in this letter, the expense of complying with the BIC Exemption cannot be appropriately accommodated within the fee schedules and arrangements embedded in existing contracts. If the BIC Exemption applied to pre-existing IRA sales MetLife would have to re-state the fees in the contract which would likely require insurance department and customer approval. That approval may not be granted by the various state insurance departments. Without fee changes, the expense ratio and internal rate of return of these contracts would be substantially modified by BIC with no means of recouping those losses. A requirement to incur those additional costs with no ability to adjust fees would be an unconstitutional taking of property without compensation.

MetLife has close to 650,000 brokerage account based IRAs through MetLife Securities, Inc. This does not include the annuities sold to those IRAs or annuity based IRA products. The sheer burden of contacting close to a million customers with a contract and re-stated fees (if approved) that they did not request would pose significant expense and in many cases would make the impacted products financially unviable. MetLife asks the Department to clarify that

the proposal applies to “recommendations” made after the date the proposal becomes fully applicable and that recommendations or sales prior to that date are not impacted unless those same contracts are the subject of continuing investment recommendations by the sales person or company after the proposal becomes fully applicable. For existing contracts where continuing investment recommendations are being provided, MetLife requests a simplified notice that can be sent to the customer rather than the BIC contract.

4. The “Best Interest” definition needs to be revised by removing the phrase “without regard to the financial or other interests of the Advisor, Financial Institution, or any Affiliate, Related Entity, or other party.”

The BIC Exemption mandates compliance with an impartial conduct standard that requires the advisor to provide advice in the “Best Interest” of the investor, i.e., “advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Advisor, Financial Institution, or any Affiliate, Related Entity, or other party.” We are informed that the underscored language has been “borrowed” by the Department from Section 913 of the Dodd Frank Act. For the following reasons, the imposition by the Department of this heightened standard on advisors to ERISA plans, participants and IRA Holders is not supported by law.

Section 913 of Dodd Frank required the SEC to complete a study of the implications of adopting a uniform standard of care for broker dealers and investment advisors, and authorized *the SEC* to adopt a regulation establishing a uniform standard of care “*as necessary or appropriate in the public interest and for the protection of retail customers (and such other customers as the Commission may by rule provide)....*” *Id.*, subsection (f). Section 913 does not provide the Department with any authority with respect to the standard of care set forth therein. Accordingly, it is submitted that the Department must look to its authority under ERISA. As is discussed further below, the applicable standard of care under ERISA for the last forty years has been the “prudence” standard. There is nothing in Section 913 of Dodd Frank that authorizes the Department to change that.

Moreover, Section 913 imposes other requirements on the SEC in promulgating a uniform standard of care for broker dealers and investment advisors, which are not adequately addressed by the Department’s Proposal. First, Section 913 is focused on providing “personalized investment advice to a retail customer.” Under our reading, there is no such limitation in the Proposal. Second, Subsection (k)(1) provides: “*The receipt of compensation based on commission or other standard compensation for the sale of securities shall not, in and of itself, be considered a violation of such standard applied to a broker or dealer.*” That same

Subsection also expressly provides: *“Nothing in this Section shall require a broker or dealer or registered representative to have a continuing duty of care or loyalty to the customer after providing personalized investment advice about securities.”* Finally, Subsection (k)(2) provides: *“The sale of only proprietary or other limited range of products by a broker or dealer shall not, in and of itself, be considered a violation of the standard set forth in paragraph (1).”* Thus, Congress clearly has mandated that these principles be embodied in any standard of care adopted under Section 913. However, the Proposal addresses none of these principles. Therefore, even assuming that the Department had the authority to “borrow” the standard of care from Section 913, it has not complied with the statutory requirements.

Finally, although the staff of the SEC³ submitted a report as required by the statute in January 2011, which recommended a uniform standard of care, no proposed regulation has been issued to date. Rather, since that time SEC staff has continued to study the possibility of a uniform standard of care. One of the principal focuses of these studies has been the potential economic impact of such a regulation on customers as well as brokers and advisors. While the SEC has not shared the results of its analysis yet, there can be little doubt that the economic impact would be substantial. Where, as here, the Department has not limited the standard to personalized investment advice to retail customers and has ignored other important requirements regarding the compensation and sales by brokers, the impact can only be greater. [However, the Proposal contains no analysis of the potential economic impact of the heightened standard of care. Michigan v. EPA, 526 U.S. 6/29/15]. For all of the foregoing reasons, the Department cannot and should not impose the Section 913 standard of care on ERISA fiduciaries. Rather, the Department must look to its authority under ERISA.

This Best Interest definition needs to be revised by removing the phrase “without regard to the financial or other interests of the Advisor, Financial Institution, or any Affiliate, Related Entity, or other party”. Although MetLife agrees that an advisor should act in the best interest of an investor, the proposed definition is unworkable. More specifically, requiring an insurer to act without regard to its financial or other interests while making an investment product recommendation ignores the economic reality that an insurer is in business to make a profit and cannot as a practical, legal matter act “without regard” to its own financial interests (including its fiduciary duties to shareholders or policyholders), and hope to remain in business. Any Best Interest standard needs to take into account protecting the interests of the plan participant or IRA investor, but at the same time must recognize that the financial institutions that sell these products have other fiduciary duties that cannot be ignored and must be taken into account in the pricing and fees embedded in products.

³ The Study expressly states: “This is a study by the Staff of the U.S. Securities and Exchange Commission. The Commission has expressed no view regarding the analysis, findings, or conclusions contained herein.

The Department asserts that the Best Interest standard is, in essence, the ERISA prudence standard. However, MetLife has concerns that if there is a breach of the prudence standard under BIC, the exemption is not complied with, resulting in a prohibited transaction violation for both plans and IRAs. Yet the ERISA fiduciary responsibility and prohibited transaction rules do not impose an excise tax on the breach of the duty of prudence, and this is clearly not what Congress intended. Further, MetLife sees no reason why the Best Interest standard even applies to ERISA plans and participants since fiduciaries to these plans must already comply with the ERISA prudence standard. Nonetheless, despite these issues and concerns, if the Department is not willing to forego BIC, MetLife requests that the Best Interest definition specifically reference and be limited to 404(a)(1)(B) of ERISA, which articulates the prudence standard and is the subject of a long line of jurisprudence interpreting the standard.

5. Generally, if the BIC Exemption requirements are not adhered to, the advisor risks engaging in a prohibited transaction. However, certain requirements of the exemption are so ambiguous that it would be difficult for any advisor to confirm that it's in compliance with the BIC Exemption.

The BIC Impartial Conduct standard requires that the advisor and financial institution agree contractually that they will not recommend an investment if the total amount of compensation anticipated to be received in connection with the recommended transaction exceeds reasonable compensation in relation to the total services provided. MetLife has concerns over the use and meaning of “reasonable compensation” which is not explained in the exemption and does not appear to have the same meaning as used in the 408(b)(2) regulations. Given the uncertainty regarding this definition, MetLife requests deletion of “reasonable compensation” and requests that the Department instead use the words “customary compensation in relation to that particular product or service.” Also, MetLife questions the propriety of measuring the sum total of all compensation received in connection with the sale of a proprietary annuity product against the reasonable costs of services provided to the advice recipient. In this regard, MetLife reminds the Department that insurance products include charges that are assessed not merely for the provision of services, but also for the provision of the guarantees contained in the product. PTCE 84-24, which also contains a reasonableness of compensation condition, takes into account, for purposes of determining the reasonableness of total cost, not only the costs of fees related to the provision of services but also the fees and other considerations received in connection with the purchase of the insurance or annuity contracts. MetLife urges the Department to adopt a similar measure of annuity cost reasonableness under the BIC Exemption – one that takes into account not merely the value of services, but also the value of the insurance guarantees included as part of the product.

MetLife further requests that in Section IV(B)(2) the word “reasonable” be changed to “customary”. Another area of ambiguity is the requirement that the financial institution adopt policies and procedures reasonably designed to mitigate “Material Conflicts of Interest.” The BIC Exemption definition for “Material Conflicts of Interest” does not explain the term “Material” so the Department should provide a clear materiality standard.

The BIC Exemption requires advisors and financial services companies to represent that the investment will, in essence, meet the ERISA prudent man standard. As noted in an April 2005 article in the Journal of Pension Benefits, “The prudent man rule is only 42 words long, but it is the parent of scores of litigated cases and millions of words of analysis. Despite this volume of information the rule still creates confusion and discomfort. That is doubly true in the context of participant directed plans.” The Second Circuit Court of Appeals called the ERISA prudence standard “one of the highest duties known in the law.” See Donovan v. Bierwirth, 680 F.2nd 263, 272 n.8 (2nd Cir. 1982).

To add additional untested and undefined standards to the prudence obligation leaves the overall requirements for BIC so uncertain as to expose financial institutions seeking to use the exemption to potentially enormous financial risks, the scope of which cannot reliably be estimated in light of the legal uncertainties introduced by the Department’s new language. These uncertainties are so great that many financial institutions, including MetLife, may conclude that reliance on the BIC Exemption would itself be imprudent to the company’s other constituencies, including its other policyholders, its employees and shareholders. MetLife requests, at a minimum, the changes recommended above to the BIC terms and requirements, and that the Department consider providing a detailed definition of each standard. MetLife would be happy to work with the Department on crafting these definitions.

6. The written contract warranty requirements of the BIC Exemption raise concerns that the breach of any warranty could result in contractual liability to the advisor under state law. MetLife has concerns that this provision could allow dual state and federal causes of action unless a court determines that ERISA preemption applies.

In ERISA preemption cases, the Department has typically supported arguments that ERISA preempts state laws. Yet the BIC Exemption’s conditions intentionally establish a basis for state-law based claims. This would seem to indicate that the Department has shifted away from its traditional support of ERISA preemption in favor of allowing a dual set of state law causes of action that are created through the warranty provisions of its exemption. Such a fundamental shift away from the federalization of employee benefit plan regulation is deeply troubling.

Given the conflicting state and federal claims and causes of action and the preemption concerns, MetLife requests that the term “warranty” be eliminated from BIC.

MetLife also requests elimination of the entire warranty provision regarding the prohibition on use of “quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other actions or incentives to the extent they would tend to encourage individual advisors to make recommendations that are not in the Best Interest of the Retirement Investor.” The word “*tend*” invites subjective judgments that are far too amorphous to serve as a legal standard.

An example of the importance of minimum production requirements and other incentives is demonstrated by the provisions of the Internal Revenue Code pertaining to full time life insurance salesmen. Internal Revenue Code Section 3121 and concomitant regulations provide that “full time life insurance sales agents whose principal business activity is selling life insurance or annuity contracts or both, primarily for one insurance company” are statutory employees. The regulation and interpretive letter rulings note that to be a full-time life insurance salesperson the individual must spend full time effort selling life and annuity products and that only the sale of life and annuity products will qualify an individual as a statutory employee. Specifically, the sale of accident and health or welfare based products count against a salesperson in determining statutory employee status. Statutory employee status is very valuable to salespeople. Statutory employees can participate in the employee benefit plans of the employer like common law employees but can deduct unreimbursed business expenses on Schedule C to the Form 1040 when they file their individual income tax returns. Common law employees deduct unreimbursed business expenses on Schedule A subject to floors, caps and limitations that make these deductions far less valuable.

In order to determine which of our salespeople is appropriately designated as a statutory employee, MetLife requires minimum production of first year commissions. This is our only way of gauging whether they have put forth “full time effort on sales for one insurance company,” namely, MetLife. MetLife also compares the ratio of life and annuity sales to other products annually. Only those advisors who sell a majority of life and annuity products are designated statutory employees for the calendar year. It is unclear to MetLife whether enforcing the requirements of the Internal Revenue Code would be considered “quotas” prohibited under BIC. MetLife does not see any other reasonable way to comply with the Internal Revenue Code requirements which are mandatory to defining when a salesperson is a statutory employee applies.

Stock companies engaged in financial services are in business to serve their customers and to generate fair returns on capital (i.e., profits) when doing so. Given the significant compliance

expense of training, supervising and educating our salespeople, it is entirely reasonable to have minimum production requirements in place to measure whether they are performing in a manner that warrants the substantial financial investment the enterprise makes in them. Further, it would be extremely difficult to conclusively determine that quotas, bonuses, differential compensation, etc., do or do not encourage recommendations that are not in the Best Interest of the investor.

As an alternative, MetLife suggests that companies that exercise appropriate oversight of their sales force can and should be presumed NOT to be using “quotas, appraisals, performance, personnel actions, bonuses, contests, special awards or other actions or incentives that tend to encourage individual advisers to make recommendations not in the best interest of the retirement investor.” MetLife has attached, for the Department’s reference (see Attachment B), an overview of the manner in which it supervises the sales of its individual advisers and requests that the Department recognize, within the BIC Exemption, that any company that has these or substantially similar oversight practices is deemed to have met this standard within BIC.

7. Section IV(a) of the BIC Exemption requires financial institutions to offer “a range of assets that is broad enough to enable the advisor to make recommendations with respect to all of the asset classes reasonably necessary to serve the Best Interests of the Retirement Investor in light of its investment objectives, risk tolerance, and specific financial circumstances.”

MetLife requests that the Department provide an explanation and examples of “asset classes,” and also confirm that if an investor asks to purchase guaranteed products, and if the sales person offers only guaranteed products to the investor, that this meets the “range of asset” requirement and is serving the “Best Interest” of the customer.

Similarly, MetLife requests clarification that an insurer would not raise any Best Interest concerns merely by virtue of offering only its proprietary products to a customer. MetLife notes that in many markets, such as annuities to fund 401(k) plans; particularly stable value products, we are not aware of any insurance company that sells non-proprietary products. Therefore, without the requested clarifications and explanations, MetLife may not be prepared to accept the legal risk of offering these valuable proprietary products to non-participant directed plans with fewer than 100 participants.

8. Section IX of the BIC Exemption requires the financial institution to maintain a significant amount of information by quarter concerning investment inflows, outflows, and holdings for each asset purchased, sold or held under the exemption, including the identity and quantity of the assets purchased, held, or sold, the cost to the investor of each asset

purchased or sold, the revenues received by the financial institution or affiliates in connection with the purchase, holding, or sale of each assets, etc. The cost of complying with this requirement would be enormous and would far outweigh any potential value to consumers. Accordingly, the data maintenance conditions of Section IX of the BIC Exemption should be deleted.

The data required under Section IX is required to be maintained for a period of six years from the date of the transaction and must be made available to the Department within six months from the date of request. To maintain all this information and to set up systems and processes that could enable a response to the Department within six months will be extremely expensive and time consuming to implement. MetLife questions the need and what benefits flow from this requirement.

Specifically MetLife would need to design new IT programs, link existing programs to them to feed data, have a user test the system to determine that it can produce the correct reports and is distinguishing necessary data from useless data for these reports. The comment period is too short for us to appropriately estimate expense. MetLife incorporates by reference herein from the ACLI Comment Letter, the section describing the impracticality of the BIC disclosure and reporting requirements and the section describing member company concerns with the Department's Regulatory Impact analysis. For the reasons set forth in those sections of the ACLI Comment Letter, MetLife is certain that this one requirement will cost MetLife alone millions of dollars to implement appropriate IT systems, update them and maintain the integrity of this reporting.

D. Comments on the Department's Proposed Amendments to and Proposed Partial Revocation of PTCE 84-24.

1. The Department Should Retain the Current Provisions and Requirements of PTCE 84-24; Most Proposed Amendments Are Unwarranted. In Particular, PTCE 84-24 should continue to be available to cover the sale of Variable Annuity Products to IRAs.

The Department is proposing to amend the requirements and conditions of PTCE 84-24. PTCE 84-24 currently provides an exemption for certain prohibited transactions that occur when plans or IRAs purchase an annuity product. The exemption permits a company that is a party in interest to a plan or IRA to sell annuity products to those retirement plans, and for salespeople, brokers, and consultants that are parties in interest or fiduciaries with respect to plans or IRAs to receive commissions. The exemption requires disclosure to the plan or IRA of the relationship of the salesperson, broker, or consultant to the company, and the sales commission to be paid pursuant to the sale. The exemption also requires disclosure and a description of any charges, fees, discounts, penalties or adjustments which may be imposed

under the annuity contract in connection with the purchase, holding, exchange, termination or sale of the contract. The exemption prohibits the company, salesperson, broker and consultant from holding certain fiduciary positions regarding the plan or IRA, such as having discretionary authority and control over plan or IRA assets. Prior to consummating the sale of an annuity product, and after all the required disclosures have been made, a fiduciary independent of the company, salesperson, broker, or consultant must, in writing, acknowledge that the plan or IRA has received the disclosed information and approved the transaction on behalf of the plan or IRA.

This exemption has been in effect since 1977 and has been effectively utilized since then by sellers and purchasers of annuity products. PTCE 84-24 provides a significant amount of protection, information and disclosures to purchasers of annuity products, and is one of the most comprehensive and effectively utilized PTCEs. MetLife is not aware of any annuity customer complaints or concerns regarding the utilization and application of PTCE 84-24 nor is MetLife aware of any inquiries or investigations into PTCE 84-24 abuses. Accordingly, the Department's proposed modifications of PTCE 84-24 are unwarranted. MetLife objects to the proposed removal of purchases of IRAs or variable annuities within IRAs from 84-24 and coverage of these purchases exclusively under BIC. All annuities have been covered under PTCE 84-24 since 1977. The changes brought about by the Proposal will create a significant amount of confusion and uncertainty in the annuity sales marketplace for plan sponsors, plan fiduciaries and IRA holders. MetLife sees no rationale or justification for the Department to require annuity products to use two separate and distinct exemptions. Thus, MetLife requests removal of Section I(b) of the Exemption which states that PTCE 84-24 should not apply to the purchase by an IRA of a variable annuity contract or another annuity contract that is a security under the securities law. There is no justification or rationale for treating annuity products differently, whether or not the annuity is deemed a security. For example, some annuity products contain both fixed and variable annuity features (See, e.g., recent IRS PLRs 201519001 and 201515001) and it makes no sense for such a product to have to rely on two separate exemptions with different conditions and requirements. The Department is well aware of the importance of annuity products for the attainment of retirement security by plan participants and IRA holders, and the importance of annuity products offering a lifetime income option. Therefore, any proposal that could hinder annuity purchases and cause confusion by requiring annuity products to use different exemptions, with different requirements and conditions, is unwarranted.

2. The Department Should Withdraw its Proposal to Amend PTCE 84-24 by Adding Section II, the "Impartial Conduct Standard."

Again, it is MetLife's position that PTCE 84-24 has been utilized effectively since 1977, has provided significant and sufficient protections to annuity product purchasers, and does not need to be changed. The Impartial Conduct Standard would apply to companies, salespeople, brokers, or consultants who, pursuant to the annuity sale process, would be deemed investment advice fiduciaries by recommending an annuity product. The Impartial Conduct Standard would require the sellers to act in the "Best Interest" of the plan or IRA purchasing the annuity, which includes the requirement that the company act without regard to its own financial interests, or interests of its affiliates, etc. As stated in our BIC comments, MetLife again proposes deleting the "...without regard to the financial or other interests of the Advisor..." requirement.

Further, as stated in our comments on BIC, the "Best Interest" standard is, in essence, the ERISA prudence standard. However, MetLife is concerned that if there is a breach of the prudence standard, under PTCE 84-24, the exemption would not be complied with, causing a prohibited transaction violation by both plans and IRAs. This is not what the ERISA fiduciary responsibility and prohibited transaction rules require and is clearly not what Congress intended. Further, MetLife see no reason why the "Best Interest" standard even applies to ERISA plans and participants since fiduciaries to these plans must already comply with the ERISA prudence standard. Once again MetLife believes the Department's modifications to this PTCE undermine ERISA and current fiduciary standards. MetLife requests that the "Best Interest" definition not apply to ERISA plans and participants already covered by ERISA's standards and remedies. Alternatively, consistent with our comments on BIC, MetLife requests that the Department explicitly and exclusively reference the prudent man standard in ERISA 404(a)(1)(B) if Best Interest remains part of PTCE 84-24. MetLife believes the prudence standard is the appropriate standard if Best Interest remains part of PTCE 84-24 because the duty of loyalty has traditionally, even for the largest of plans, never been subject to prohibited transaction penalties and should not be subjected to those penalties under this Proposal.

3. MetLife is Concerned with the Department's Proposal to Change the Definition of "Sales Commission" as Currently Defined in PTCE 84-24.

An insurer is required to disclose sales commissions that will be paid by the insurer to an agent, broker, or consultant in connection with the purchase of a recommended annuity contract. The proposal would replace the term "sales commission" with "Insurance Commission". This term means the sales commission paid by the insurer or an affiliate to the agent, broker or consultant for effecting the sale of an annuity contract, including renewal fees and trail commissions, but not revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurer and affiliates.

The current PTCE 84-24 “sales commission” disclosure definition has been in effect since 1977, and was drafted to take into account the company’s commission and compensation payment practices. Under current FINRA requirements, MetLife provides extensive disclosure of “cash and non-cash” compensation. MetLife needs further guidance and clarification on the definition of “Insurance Commission”. For example, some commissions are paid as overrides or gross dealer concessions to someone that oversees the agent working directly with the customer. These are often not referred to as “commissions” and are management payments for overseeing the salespeople who made the annuity sale. MetLife also provides credits toward retirement programs for sales of MetLife products. We need clarity on whether this is included in the permissible “Insurance Commission” language and that it is not an impermissible action under BIC that would fall into the category of “special awards or differential compensation prohibited under BIC.

Also, insurers have sales people who are common law employees and receive compensation in addition to the commission. This could include salary and bonuses, overtime pay, and health and retirement benefits. Although not typically considered commissions, MetLife seeks confirmation that these payment practices can continue.

Also regarding Insurance Commissions, PTCE 84-24 permits the purchase with plan assets of an annuity contract from the insurer, even if the insurer is a party in interest to the plan. MetLife seeks confirmation that PTCE 84-24 continues to cover the sale of the insurer’s proprietary products especially given the overly broad definition of fiduciary investment advice, and given that the insurer earns a profit inherent in the proprietary product. MetLife also seeks confirmation that investment management fees paid to an affiliated investment manager in connection with proprietary annuity products will be covered under PTCE 84-24, and that proprietary investments held under an annuity are also covered. Finally, MetLife seeks confirmation that revenue sharing payments, Rule 12b-1 fees and other administrative fees provided for under the contract, paid to the insurer or an affiliate from investment funds available through the annuity contract are permissible since these payments are part and parcel of the annuity contract sale covered by the exemption.

Finally, as noted in the ACLI comment letter on the Proposal regarding 84-24, clarification is needed that revenues earned by the company are not restricted by 84-24 as revised in light of the Proposal. Specifically MetLife notes that the terminology “administrative fees” is as problematic and in need of a clear definition.

E. Other Comments.

1. The Department Should be Cautious Regarding Consideration of a Streamlined PTCE For Investments in High Quality Low Fee investments.

The Department is considering issuing a PTCE that would be available for high quality low fee investments, and the exemption would have fewer conditions and requirements than other PTCEs such as BIC. The Department should be cautious about issuing such an exemption. Of primary concern is that low fee investments may not necessarily always be in the best interest of plan participants and IRA holders. As explained earlier in this letter, annuity products that offer guarantees, floors and death benefits, and features such as lifetime income, may not be “low fee investments” but provide significant protections and benefits to plans participants and IRA holders and help them achieve a more secure retirement by shifting longevity risk, market risk and mortality risk to the issuer of the product. These protections and features are typically not available in “low fee investments” or account based products. Further, it would be unfair and burdensome to insurers if the Department issued a streamline low fee investment exemption with fewer conditions and requirements, which was not available to annuity products, especially if insurers would instead have to utilize BIC. Annuity products merit special consideration by the Department given their guarantee features and lifetime income options which help individuals attain retirement security. The potential for inherent inequity between brokerage account IRAs and IRAs that hold or are structured as annuities created by a “low fee” exemption is especially troubling in light of the Department’s and IRS recent focus on QLACs. These contracts are designed to be sold to 401(k) participants/plans and to IRAs. They manage longevity risk by modifying commencement dates and avoiding minimum distributions. Additionally, some of the products already brought to market by the insurance industry include return of premium guarantees and guaranteed cost of living adjustments (COLAs, some as high as 4% per year). As noted earlier, shifting longevity risk and providing guaranteed rates of return or adjustment are “insurance” features not found in basic brokerage account IRAs. This insurance adds to the capital or reserving requirements of the companies that issue them and cause the product to have greater expense and risk to the issuer. That expense is passed on to consumers through the fees charged on these products which are inherently higher than those that apply to account-based IRAs. MetLife cautions the Department that creating an unfair competitive advantage in the form of a special prohibited transaction exemption that favors account based products could significantly impede if not stop the development and sale of QLAC products.

2. MetLife Notes That the Proposal Has the Potential to Create a Seismic Shift in the Products and Services Offered to ERISA Plan Customers and within the IRA Market.

MetLife urges the Department not to assume that financial services companies will continue to offer products with unspecified risk of class action law suits and expansive enforcement actions that hinge on subjective or unclear standards that will be examined with the benefit of hindsight that is not available at the point any recommendation is made. In doing so, MetLife urges the Department to consider the disruption to US retirement savings if existing annuity

options are not offered prospectively or new deposits into these contracts are not accepted. Many consumers specifically sought out these products, understand them and use them appropriately to mitigate longevity risk, market risk, and mortality risk. To deprive millions of consumers of these products by making them financially unviable is not in the best interest of the financial services community or consumers MetLife proudly serves.

MetLife also supports and explicitly endorses the comment letters of the following industry groups of which MetLife has reviewed and contributed to: The American Council of Life Insurers, The Insured Retirement Institute, and the Committee of Annuity Insurers.

Should any questions arise in connection with our comments, or if MetLife can provide any assistance to the Department in connection with the Proposed Regulation and PTCEs, please contact Phyllis Zanghi at 980-949-3362 or 11225 North Community House Road, 8.692, Charlotte, NC 28277.

Sincerely,

A handwritten signature in dark ink, appearing to read "E. Steigerwalt", with a stylized flourish at the end.

Eric T. Steigerwalt
Executive Vice President

Attachment A

SUMMARY OF ANNUITY OPTIONAL FEATURES WITH GUARANTEES*

*Optional features available for an additional fee; features subject to state availability

Product Feature or Rider Name	Description
Enhanced Death Benefit ("EDB")	This rider provides for a death benefit potentially in excess of the account value in the event of the owner's death. As an example of one type of EDB, MetLife has an annuity that includes a "benefit base" which is based on purchase payments and increases at 4% annually (assuming no withdrawals). The benefit base typically steps up to the annuity's account value if greater on a permitted contract anniversary. The EDB would equal the higher of the account value or the benefit base.
Guaranteed Minimum Income Benefit ("GMIB")	This rider provides for guaranteed income based on a benefit base rather than the account value. The GMIB's benefit base is determined using the purchase payments increased by 4% annually or the highest anniversary value (purchase payments adjusted for withdrawals and recalculated annually based on actual account value) if greater. This rider allows the owner to withdraw 4% of the benefit base each year while the contract is in effect. The Owner has the option of annuitizing the contract (after a ten year waiting period) based on the benefit base, at guaranteed annuity rates, instead of the account value.
Guaranteed Lifetime Withdrawal Benefit ("GLWB") ⁱ	This rider provides the contract owner with the right to withdraw a level percentage of a "benefit base," or the owner's Required Minimum Distribution, each year for life regardless of the account value (which fluctuates with investment performance). There is also a version of this rider which offers a higher withdrawal rate if the account value is above zero and the lower rate if the account value is at zero.
Guarantees against negative returns-Index Linked Annuities	MetLife's indexed-linked annuity, provides a level of guarantee or protection from loss. The customer can select protection of 10%, 15%, 25% and 100%, for varying terms between 1 and 6 years, based on selected outside index performance. The guarantees on loss provide for a pre-selected cap on upside potential, which varies based on the percentage of downside protection selected and the term of the downside protection.

ⁱ The following data from the Life Insurance Marketing and Research Association ("LIMRA") demonstrates that contract owners are actually taking advantage of this type of contract feature:

- 23% of all contracts with a GLWB rider had some withdrawal activity during 2013
- Withdrawal activity increases to 66% for qualified annuity owners over age 70
- 95% of GLWB customers who bought their contracts in 2012 took withdrawals in 2012 and 2013

Similar industry data is not available for some of the other product features described above.

Attachment B
Controls for Individual Retirement Investment Product
Sales by MetLife-Affiliated Financial Services Representatives¹

1. Comprehensive Training

- Product knowledge/training – Comprehensive annuity product training is required, whether or not required by state law. Training is also required for mutual funds, advisory products and other securities products.
- Retirement-specific training -- Retirement planning training is available.
- Wholesaler support – Wholesalers from other product issuers, as well as wholesalers representing MetLife proprietary products, are given access to MetLife sales offices, so that MetLife Financial Services Representatives (“FSRs”) are trained about various product options.

2. Robust Suitability Process

- Culture of suitability – MetLife required sales of fixed insurance products to be suitable for customers long before states started enacting annuity suitability requirements. Customer centricity is a key MetLife value.
- Needs analysis – A needs analysis is required before each sale and must be documented in the FSR’s client file. A sampling of client files is reviewed by sales office management and by compliance examiners.
- New business call outs -- New business personnel conduct telephone interviews with select annuity applicants prior to the issuance of certain MetLife proprietary variable annuities. A transcript of the customer’s responses is sent to the registered principal to consider as part of the overall suitability of the annuity case.
- Suitability review -- Suitability is reviewed on annuities, life products, direct participation plans, initial mutual fund purchases, initial 529 plans and 3rd party advisory accounts (when the relationship calls for it) by back office personnel before issue. For the sale of securities, including variable insurance products, the suitability review is done by a registered principal.
- Automation -- For proprietary life and annuity products, much of the suitability process is automated. Suitability flags trigger based on the data points and formulas developed for each suitability flag, e.g. purchase payment as a percentage of liquid net worth. Suitability flags that trigger require additional explanation from the registered representative and are then reviewed by the registered principal during their suitability review. The suitability review for non-proprietary life and annuity

¹ Some of the controls described above are for proprietary products only.

business is completed by a registered principal with the assistance of a manual suitability flag checklist that mirrors the automated process.

3. Risk Assessment as Part of Product Design/Selection Process

- Proprietary product design (annuity, life and investment advisory products) – A compliance officer is engaged during the product design process. Potential risks associated with each product are identified and addressed as part of the product development process. Suitability parameters for the product, and other appropriate means to address the risks, are defined as part of product development process.
- Non-proprietary product selection (annuity, life and investment advisory products) – A compliance officer is engaged during the product review and approval process. Potential risks associated with each product are identified and addressed as part of the product review process. Suitability parameters for the product, and other appropriate means to address the risks, are defined as part of product approval process.

4. Financial Service Representative Compensation

- Level cash compensation within product categories² – Compensation is levelized between proprietary life and annuity products and non-proprietary life and annuities (because compensation from the sale of proprietary product sales is benefit eligible and compensation from the sale of non-proprietary products is not, base compensation for the sale of non-proprietary products is 5% more of the gross dealer concession than that for proprietary products).
- Disclosure – Disclosure describing how our FSRs are compensated is provided at the point of every sale as follows: (1) for our proprietary and nonproprietary annuity and products, a compensation disclosure notice is given to the applicant; (2) product prospectuses for our variable products contain additional disclosure about FSR compensation; (3) the customer signs a brokerage account agreement containing disclosure when opening a brokerage account; and (4) Investment Advisory Representatives provide their customers with the Form ADV disclosure, which discloses information about compensation.

5. Quality Assurance

- Quality assurance program – Certain customers who bought a MetLife life insurance or annuity contract receive a survey, either written or by telephone, shortly after they purchase their product to help ensure that they understand key features of the product purchased and that the sale is appropriate. Currently, for MetLife proprietary annuity products, the following population is surveyed: (1) for purchasers of MetLife Preference Premier Variable Annuities: (a) 100% of contracts sold by an FSR with a pattern of replacement activity; (b) 100% of customers age 70+ who are

² Compensation is not levelized across product lines, e.g. as between mutual funds and annuities.

replacing and who didn't complete a pre-issue suitability call-out; (c) 35% of customers from ages 60-69; (d) 20% of customers age 54 and under; (2) 100% of customer who bought Shield Level Selector.

6. Surveillance

- Electronic surveillance – A number of reports are generated that seek and detect various patterns of potentially questionable sales activity, e.g. a concentration of sales in a certain product class. Compliance works with field management to take appropriate action based on the information gleaned from these reports.