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August 3, 2004

Jonathan Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Limitations on Affiliate Marketing (Regulation S-AM)
File Number S7-29-04

To Whom It May Concern:

We appreciate the opportunity to comment on the Limitations on Affiliate Marketing Rule (Regulation S-AM), File Number S7-29-04, proposed by the Securities and Exchange Commission (the "Commission") on behalf of the affiliated companies that are subsidiaries of MetLife, Inc. ("MetLife").

The proposed Regulation S-AM is substantially similar to the FACT Act Affiliate Marketing Rule proposed by the Federal Trade Commission. Therefore, we are enclosing a copy of the comments that we submitted to the FTC on its proposed rules and ask that our comments be considered in connection with proposed Regulation S-AM as well.

We applaud your efforts to craft regulations that are consistent with the approach taken by the Federal Trade Commission and the federal banking agencies, as well as with such other related federal rules as the federal telemarketing rules and rules adopted pursuant to the Gramm-Leach-Bliley Act.

We welcome this opportunity to comment on certain aspects of the proposed regulations and thank you for considering these comments.

Very truly yours,

Ira Friedman

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Senior Vice-President, Chief Privacy Officer
And Special Counsel

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July 28, 2004

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex Q)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: FACT Act Affiliate Marketing Rule, Matter No. R411006

To Whom It May Concern:

On behalf of MetLife, Inc. and its affiliated companies ("MetLife"), we respectfully submit these comments on the FACT Act Affiliate Marketing Rule, Matter No. R411006, proposed by the Federal Trade Commission (the "Commission") on June 10, 2004 (the "Proposed Rule").

MetLife is a family of companies that offer only financial services. At present, MetLife affiliates offer insurance and annuities (to individuals directly and through group coverages), personal lines property and liability insurance (primarily covering cars and homes), mutual funds, banking products and legal plans, as well as institutional money and real estate investment advisory and management services. Many of these products and services are offered through licensed agents who are typically licensed to represent multiple MetLife affiliates. The MetLife companies serve approximately 12 million individuals in the U.S. and provide benefits to 37 million employees and family members through their plan sponsors.

We applaud the Commission for thoughtfully crafting the Proposed Rule and for inviting comments both on the provisions in the Proposed Rule and on other aspects which may raise issues as to affiliate-sharing of "eligibility information" under Section 624 of the Fair Credit Reporting Act ("FCRA"). We also appreciate the willingness of the Commission to take into account the work that companies must do in order to comply with the affiliate-sharing rules and other related federal rules, such as the rules adopted pursuant to the Gramm-Leach-Bliley Act (GLB) and the federal telemarketing rules.

The Commission has invited comment on all aspects of the Proposed Rule and specifically solicited comment on various related matters. We welcome this opportunity to provide our comments. In this letter, we will refer to FACT Act provisions as they have been codified in FCRA. References to sections of the Proposed Rule will be preceded by the letters "PR."

1. Definition of "Pre-existing business relationship"

The Commission seeks comment on the definition of "pre-existing business relationship."

We have one comment. We are puzzled by the fact that the definition in the Proposed Rule, which is found at PR § 680.3(i), omits the Act's reference to a "person's licensed agent." That omission, which we assume was inadvertent, would create a disparity between the Proposed Rule and FCRA § 624(d)(1) that could raise for insurance companies (and certain other financial services organizations) significant issues that clearly were not intended by Congress.

In the insurance business, and certain other financial services businesses, companies are commonly represented by licensed agents. In fact, no person may solicit consumers on behalf of an insurance company without the necessary licenses. In multi-company enterprises such as MetLife, agents are typically licensed to represent multiple affiliates in a multi-company group. Each agent has his or her own customers who may have "financial contracts" or other "pre-existing business relationships" with more than one affiliate. Each agent services the customers that he or she brought into the companies he or she is licensed with and may also service other customers of those companies.

In the opening phrase in FCRA § 624(d)(1), Congress provided that a "pre-existing business relationship" means a "relationship between a person, or a person's licensed agent, and a consumer" (emphasis added). Thus, under FCRA § 624(a)(4)(A), a licensed agent may use eligibility information to make a solicitation for marketing purposes to a consumer with whom any insurance company with which the agent is licensed has a pre-existing business relationship.

Therefore, we urge the Commission to revise the definition of "pre-existing business relationship" found at PR § 680.3(i) to conform to the statute by inserting the reference to "licensed agents" in the same place as it appears in FCRA § 624(d)(1). In addition, we ask the Commission to conform the first example of pre-existing relationships in PR § 680.20(d)(1)(i) to fully reflect FCRA § 624(d)(1), as follows:

> **(i)** If a consumer has an insurance policy with your insurance affiliate that is currently in force, your insurance affiliate and its licensed agent who produced that policy or who services that consumer's relationship with you have a pre-existing business relationship with the consumer and can therefore use eligibility information received from you or your affiliates to make solicitations.

2. Internet Marketing

The Commission invites comments on whether, and to what extent, various tools used in Internet marketing, such as "pop-up" ads, may constitute "solicitations", as opposed to constituting communications directed at the general public that are specifically excluded from the definition. We believe that it would be inappropriate for the Commission to address Internet marketing in the context of the affiliate-sharing rules. We believe that this question poses important statutory and policy issues. If the Commission proposes to regulate Internet marketing, it should do so in a separate process in order to assure that notice and opportunity to be heard are given to the extensive community of businesses that would be affected.

From a statutory standpoint, any solicitation which is not clearly based on the receipt by a person from an affiliate of eligibility information is beyond the scope of FCRA § 624. "Pop-up" ads, and other information that may be considered "solicitations", automatically appear whenever a visitor logs on to a web site, or on to a portal within a given web site. They are not communications based on the receipt of eligibility information by one affiliate from another. Even if an ad "pops up" based on an electronic inference as to the web site visitor's interests, as indicated by her having clicked on to a particular portal, no inter-affiliate transmission of eligibility information has taken place.

Even if one were to argue that Internet marketing somehow meets the predicate requirement of § 624 that there must first have been inter-affiliate sharing of eligibility information, there are numerous bases in § 624 for concluding that Congress had no intention of applying these rules to Internet marketing. First, we believe that Internet marketing is a form of communication that is directed at the general public. Second, as the Commission observed in the context of the definition of "pre-existing business relationship," it is appropriate to consider the expectations of the consumer. Consumers who visit a web site know that the web site is going to present information about the company's products or services and enable the consumer to conveniently purchase them or obtain more information. Thus, a visit to a web site amounts to an "inquiry", which the Commission says would include "any affirmative request by a consumer for information, such that the consumer would reasonably expect to receive information from the affiliate about its products or services." Third, any Internet marketing should be viewed as occurring "in response to a communication initiated by the consumer" (FCRA § 624 (a)(4)(D)) by clicking on to that web site or portal.

Perhaps even more importantly, from a policy perspective, it would be inappropriate, and unfair, for FCRA § 624 to be used as a platform for regulating Internet marketing. Internet marketing is a very widespread practice. We are not aware of any indication that Congress intended the affiliate-sharing rules to be used to regulate Internet marketing. If the Commission were to rule that Internet marketing is subject to the affiliate-sharing rules, it would be plunging into an area with numerous public policy considerations and widespread implications. If the FTC wishes to regulate Internet advertising, it should do so in the context of specific rule-making on the subject and afford the myriad companies who engage in Internet marketing fair notice and the opportunity to comment. We

strongly urge the Commission not to address Internet marketing in the context of the affiliate-sharing rules.

3. Call Center Communications

We respectfully ask the Commission to clarify in its examples regarding consumer calls to call centers those actions that would be considered subject to an opt-out notice requirement and those that would not. In addition, we urge the Commission to determine that a pre-recorded message about the products and services offered by various affiliated companies, which plays automatically when a consumer calls a call center, is not a "solicitation".

Some of the Commission's examples involve issues that may arise in the context of call center communications. In PR § 680.20(d)(1)(iv), the Commission indicates that a telephone call to a call center asking for information about an account with a lender is not an inquiry with any of that lender's affiliates. Similarly, in PR § 680.20(d)(2)(iii), the Commission implies that a consumer's call to a company – which, though not stated in the example, would typically be handled by a call center - to ask about its retail hours and locations is not in and of itself a request for information about the products or services of the company's affiliate.

We ask the Commission to include two additional examples in order to assure that unintended lessons are not learned from examples (d)(1)(iv) and (d)(2)(iii).

First, we ask the Commission to amplify these examples in order to clarify the Commission's point. Specifically, the calls referred to in these examples are, or should be considered, inquiries regarding a product or service. Consequently, they establish a pre-existing relationship with the lender in the first example and the retailer in the second. If the lender's or retailer's call center operator asks the caller whether he is interested in hearing about products or services offered by an affiliate, the call operator is acting on behalf of the lender or retailer itself (as the case may be). Therefore, at that point in time the communication comes within the paragraph (a)(4)(A) exception in FCRA § 624. On the other hand, if the lender or retailer subsequently shares eligibility information about the consumer with an affiliate, the call referred to in the first example will not have established a pre-existing business relationship between the consumer and that affiliate, and the call referred to in the second example was not a consumer-initiated communication to the affiliate.

Second, we ask the Commission to include an example indicating that a pre-recorded message about products or services offered by various affiliate companies, which automatically plays when a consumer calls a call center, is not a "solicitation" based on affiliate-sharing of eligibility information.

When a consumer calls a call center, it typically takes time for the call to be routed to the unit that can best respond to the consumer's questions or requests. It is common practice in financial services and many other industries for a pre-recorded message about the

products and services offered by various affiliated companies to play automatically during that period. These messages do not play based on the receipt of eligibility information by one affiliate from another. They are very much akin to "communications that are directed at the general public." Therefore, we ask the Commission to determine in the Proposed Rule that they are not "solicitations".

4. "Constructive Sharing"

The Commission solicits comments on what it describes as "constructive sharing." The Commission poses two scenarios in its request for comment. In the first, a finance company defines for its retailer affiliate the attributes that would make certain retailer customers good prospects for finance company products. The retail affiliate does not give the finance company any eligibility information about the retailer's customers. The retailer makes its own mailing to its own customers (i.e., consumers with whom it has a pre-existing business relationship) and, therefore, may communicate to without regard to whether they have been given notice or opted out. In the second fact pattern, there is arguably an implicit disclosure through the coding, whereby the finance company may be able to infer from the coded form certain eligibility information about those retailer customers who respond to the solicitation; even if this is receipt of eligibility information, it takes place after the solicitation.

The FCRA restriction on affiliate use of shared information for solicitations is found at § 624(a)(1): "Any person that ***receives*** from another person related to it by common ownership...***may not use*** the information to make a solicitation..." (emphasis added). Thus, the express language of the Act prohibits someone who has received what the Proposed Rule calls "eligibility information" from subsequently using it for marketing purposes without first providing notice and an opportunity to opt-out.

As to the first scenario, no "person" has received eligibility information from an affiliate. It is not a case where an affiliate, having received eligibility information from a second affiliate, asks a third affiliate to make a solicitation on its behalf based on that eligibility information. Thus, the predicate for the requirements of § 624(a)(1) to apply has not been met. As to the second scenario, even if there is arguably a transmission of eligibility information, it takes place after the solicitation by reason of responses to the solicitation. This seems to fall outside the terms of § 624(a)(1). It seems clear from the plain language of § 624(a)(1) that in order for the requirements of paragraph (a)(1) to apply, the recipient must not only have received eligibility information from an affiliate, but such receipt must have taken place prior to the solicitation. (We also note that the facts in this scenario might be covered by one or more of the "scope" exclusions in § 624(a)(4).)

Thus, what the Commission refers to as "constructive sharing" does not appear to be within the scope of FCRA § 624.

5. Solicitations on Behalf of a Person by its Servicing Affiliate

FCRA § 624(a)(4)(C) removes from the scope of the Act the use of eligibility information received by a person to perform services on behalf of its affiliate, other than a service that would constitute a solicitation that the affiliate would not be permitted to send on its own behalf as the result of a consumer's opt-out. The PR parallel exception does not conform to the statute in that it adds that performing services on behalf of the affiliate will not be construed as permitting "...you [FCRA's "person"] to make or send solicitations *on your behalf or* on behalf of an affiliate *if you* or the affiliate, as applicable, would not be permitted to make or send the solicitation as a result of the election of the consumer to opt out..." (PR § 680.20(c)(3), emphasis added). The italicized words do not appear in FCRA § 624(a)(4)(C). In fact, that paragraph expressly refers to "solicitations on behalf of another person." Therefore, we respectfully submit that PR § 680.20(c)(3) inappropriately strays from the statute and, in doing so, causes confusion and could lead to an unwarranted interpretation. The added references to "on your behalf" and "if you" should be removed.

As PR § 680.20(c)(3) is currently written, it will unfairly impose additional burdens and costs on companies in multi-company groups in which a single affiliate provides various administrative or personnel services to other affiliates in the group. Having a single affiliate provide these services to other affiliates in a multi-company group is a fairly common practice. It is a more efficient and cost-effective approach than maintaining separate staff at each affiliate to perform the same administrative services. The savings may ultimately benefit consumers in the form of lower-cost products and services.

Moreover, PR § 680.20(c)(3), as currently written, will make it harder for financial services companies to send consumers general informational materials that educate consumers about the importance of financial products in providing for their financial needs. These materials further the goal of enhancing financial literacy and education.

We ask the Commission to remove the references to "on your behalf" and "if you" from PR § 680.20(c)(3). Moreover, the Commission should make it clear that a servicing affiliate (in the type of arrangement we describe above) may provide to another affiliate's customers, at that affiliate's request, newsletters and other communications informing the public in general terms about the benefits of the types of products that any of the affiliates offer.

6. Reasonable Opportunity to Opt Out

The Commission asks whether the Proposed Rule provides for an adequate amount of time for a consumer to opt out, and whether it is necessary for the notice given to the consumer to include notice of the period of time.

We agree that the Commission's thirty (30) day safe harbor period is reasonable, as well as adequate and appropriate. However, while companies may decide to allow a longer period than 30 days, the safe harbor should not be longer. A safe harbor is likely to be viewed as a minimum mandatory waiting period. Marketing campaigns typically require

extensive planning, and it is important to minimize delays so that the campaign does not become stale or out of step with the marketplace. Viewed from the consumer's perspective, 30 days is ample time for a consumer to opt out and for the opt-out to be received by the company. Moreover, the consumer can exercise the right to opt out at any time; the right is not forfeited by any delay in exercising it.

We do not believe that actual notice of a specific period of time is necessary.

7. Mandatory Compliance Date

The Commission requested comment on whether there is any need to delay the compliance date beyond the effective date, to permit financial institutions to incorporate the opt-out notice into their next annual GLB notice.

We are pleased that the Commission will consider establishing a mandatory compliance date that is subsequent to the effective date. We urge the Commission to establish March, 2006 as the mandatory compliance date. This would give companies 6 months to complete the systems and procedural work necessary to implement an opt out process on a cost-effective basis and then allow companies to combine the opt-out notice with the annual GLB notice over the course of a full year's GLB notice cycle.

Largely as a result of the FACT Act, quite a few financial institutions will for the first time be providing their customers with an opt-out election this year. These institutions do not sell customer lists to other companies or make other disclosures to unaffiliated third parties under circumstances that would require giving an opt-out election. In effect, they have opted out on behalf of their customers and other consumers as to such unaffiliated third party disclosures. For these institutions, giving an opt-out notice requires:

- Intensive planning to assure that their target dates are met with understandable and actionable communications to their consumers, a cost-effective means for receiving and recording opt-out elections and an effective, controlled process to assure compliance with those elections.

- Extensive systems changes for the operations that are responsible for giving privacy notices.

- A new notice given to large numbers of customers in time for them to make their election, if they are so inclined, and for the institution to receive and act on their opt-outs by the mandatory compliance date, without any undue disruption in their marketing activities.

These financial institutions have begun to prepare to send opt-out notices this year, largely in order to avoid disrupting marketing programs once a March, 2005 effective date arrives. However, the companies who are subject to the affiliate-sharing rules may have to await the final regulations before they know for certain what the affiliate-sharing rules prescribe as the content of, and process for, the opt-out notices. In addition,

mandating compliance on the effective date will make it difficult for companies to coordinate the notices to consumers required by FCRA § 624 with their other notices, such as their privacy notices required by GLB. Although affiliates have various methods for sending out the annual GLB notices, many GLB notices are sent on the anniversary date of purchase or renewal. Therefore, after the initial efforts required after publication of the final rule, a full year will be needed to complete the full cycle of GLB mailings.

There is recent precedent for a longer mandatory compliance date. The final privacy rule promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") was published in December, 2000, and established a compliance date of April, 2003 (April, 2004 for small health plans). The HIPAA rule also required entities to distribute privacy notices.

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Thank you for your kind consideration of this comment letter.

Very truly yours,

Ira Friedman
Senior Vice-President, Chief Privacy Officer
And Special Counsel