Susan L. Blount
Executive Vice President and General Counsel

Prudential Financial, Inc.
751 Broad Street, 21st Floor
Newark NJ 07102
Tel 973 802-7001 973 802-5315
susan.blount@prudential.com

By E-mail

September 24, 2015

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

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-11712
Suite 400
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Re: Revised Definition of Investment Advice and Related Exemptions

Ladies and Gentlemen:

Prudential Financial, Inc. ("Prudential") appreciates this opportunity to provide additional comments on the Department of Labor's (the "Department") proposed regulation and accompanying proposed and amended exemptions (collectively, the "Proposals") that would redefine who is an investment advice fiduciary under the Employee Retirement Income Security Act of 1974 ("ERISA") and the Internal Revenue Code of 1986 ("Code").[1] These comments supplement our letter of July 21, 2015. Prudential is a leading provider of guaranteed lifetime income solutions both in defined contribution plans and Individual Retirement Arrangements ("IRAs"). As such, we support regulation that protects the interests of consumers and enables us to provide products and services that meet their needs. Fundamentally, we believe that regulation should provide consumer protections while ensuring IRA owners and plan participants continue to have access to the quality products and services they need for a secure retirement.

While we have narrowed the focus of this submission to address a few specific issues raised during and subsequent to the recent public hearings, the Department should not construe this submission to suggest that the concerns outlined in our July 21, 2015 submission have in any way been diminished. For purposes of this submission, we have limited our comments to the "Education" carve-out, the "Platform Provider" carve-out, the "Counterparty" ("Sellers") carve-out, and a brief revisit of our concerns respecting the Best Interest Contract ("BIC") Exemption and prohibited transaction exemption ("PTE") 84-24 in light of recent Department discussions regarding variable annuities.

[1] Any capitalized terms not defined herein shall have the meaning set forth in the Proposals.

I. INTRODUCTION

Prudential is a financial services leader with a 140-year history and approximately $1.2 trillion of assets under management as of June 30, 2015, operating in the United States, Asia, Europe and Latin America. Through our subsidiaries and affiliates, we offer a wide array of financial products and services, including annuities, retirement-related services, mutual funds, investment management, and life insurance. We offer these products and services to individual and institutional customers through proprietary and third-party distribution networks. For a fuller description of who we are and our principal comments on the Proposals, we refer the Department to our earlier letter.

II. PROPOSED CHANGES

A. The Education Carve-Out

The Department's proposal would effectively shift the burden of populating an asset allocation model to plan participants and IRA owners, who, in our experience, either do not have the time to devote to this task or may not be sufficiently familiar with investment principles to be successful at it. The Department would eliminate an important tool on which millions of individuals rely when making investment allocation decisions. By employing asset allocation models that refer to specific investments, plan sponsors and service providers are able to illustrate how asset allocation principles can actually be implemented in the participant's own plan account or in an IRA owner's IRA. These types of specific education and illustrations help individuals connect the dots, and take action that makes for better outcomes for participants and IRA owners. Prohibiting these types of illustrations will only make it more difficult to equip individual investors with the tools they need to make important retirement investing decisions. If a plan is not permitted to present asset allocation models that reference specific funds available under the plan, this may stifle educational conversations or communications about asset allocation. Given the severe consequences of being deemed to have provided investment advice under these circumstances, providers may be forced to withhold references to any specific investments and thereby significantly reduce the usefulness of the self-help tools.

It is clear from both the comment letters and testimony that Interpretive Bulletin 96-1 ("IB 96-1") has served to benefit millions of plan participants and, in assisting their participants, plan sponsors for almost twenty years. Given well recognized and established benefits derived by plan participants from this guidance, it is particularly troubling that the Department would choose to abandon IB-96-1 in favor of more restrictive guidance in the absence of any empirical evidence supporting a problem or need for restrictive changes. We strongly encourage the Department to revisit and adopt the position it took in its 2010 proposed changes to the definition of "fiduciary," in which it preserved the investment education principles of IB 96-1 in their entirety and we further encourage the Department to extend the benefit of such assistance to plan sponsors and IRA owners.

Should the Department, even in the absence of empirical support for change, remain committed to narrowing the scope of IB 96-1, we urge the Department, at a minimum, to modify the proposed Education Carve-Out so as to clearly allow the presentation to plan participants and IRA owners of asset allocation models that reference specific investment products when those products are selected either by a plan sponsor or by a financial expert that is independent of the party or parties that offer or make available investments under the plan. For such purposes, a financial expert would not be considered

independent if a financial interest exists (e.g., compensation, fees, etc.), ownership interest, or other relationship, agreement or understanding that would limit the ability of the party to carry out its responsibilities beyond the control, direction or influence of any party offering or making available plan investment alternatives.[2] We believe such an approach will help ensure participants and IRA owners have access to important investment tools that help them achieve a secure retirement.

Again, assuming the Department is committed to restricting the scope of IB 96-1, we believe that involving an independent financial expert in the populating of an asset allocation model addresses any concerns the Department might have with regard to potential "steering" in the IRA marketplace. Recognizing there is no plan sponsor to assist an IRA owner with regard to the populating of asset allocation models a provider makes available, the utilization of an independent financial expert affords IRA owners the same opportunity for a useful investment tool as plan participants. An IRA owner should at least be given the option to see the model portfolios that an independent financial expert would identify for each of the model allocations.

Three important points to keep in mind should the Department permit asset allocations models to be populated with specific investment alternatives selected by a plan sponsor or independent financial expert -

- First, the Department should not require that the populated model portfolios make use of each and every alternative available under the plan or IRA platform. Such a requirement, particularly in a plan with a large number of investment options, will overwhelm most participants and IRA owners and, thereby, undermine the utility of the model. Moreover, it would seriously undercut the purpose of presenting a populated model portfolio, which is to provide a *realistic* example of how the model asset allocation might be implemented. Few experts would suggest implementing an asset allocation by using *all* of the available funds. In addition, increasing the number of included investments would increase the size, length and frequency of communications received by plan participants and IRA owners.[3]

- Second, the Department should not, in the context of providing investment education, treat the populating of an asset allocation model as a fiduciary act, whether undertaken by the plan sponsor or independent financial expert. Just as it is today under IB 96-1, the populated model would be presented as an *illustration* of how a particular asset allocation *could* be implemented using the investments available under the plan or IRA platform. Neither the asset allocation itself nor the model portfolio would be *recommended* by anyone as appropriate for the participant or IRA owner. Instead, the model portfolio would represent additional information – one of several tools – that the individual could use to evaluate his or her options.

---

[2] See DOL Adv. Op. 2001-09A, footnote 11.

[3] In some cases, plans make a large selection of investment alternatives available to participants with multiple choices within an asset class. In such cases, it could be counterproductive within an asset allocation model to present 10 or more large cap funds, for example. An emerging body of research suggests that providing too much information limits an individual's willingness to consider it. Participants seeing a sample asset allocation model with many funds within an asset class might simply put the presentation aside rather than consider the potential benefits of asset allocation.

Moreover, fiduciary advice programs are already available to participants and IRA owners, typically for an additional fee. One of the objectives of IB 96-1 and the Education Carve-Out is to facilitate access by individuals to important investment information without imposing the regulatory compliance costs and risks associated with fiduciary advice programs.[4]

- Third, in the IRA context, we urge the Department to recognize that permitting fund selection by an independent financial expert will be meaningful only if the Department also expands the Platform Provider carve-out to include IRA platforms as discussed further below.

As an alternative to preserving IB 96-1 in its entirety, we offer the following revisions and additions to Section (b)(6)(ii) and to the definitions in Section (f) for consideration:

(iii) Asset allocation models. Information and materials (e.g., pie charts, graphs, or case studies) that provide a plan fiduciary, participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with different time horizons (which may extend beyond an individual's retirement date) and
risk profiles, where—

(A) Such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (e.g., equities, bonds, or cash) over defined periods of time;

(B) All material facts and assumptions on which such models are based (e.g., retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return <u>and the role of any plan sponsor or independent financial expert in the selection of investment products or alternatives</u>) accompany the models;

(C) Such models <u>either</u> --

(I) do not include or identify any specific investment product or specific alternative available under the plan or IRA <u>or (II) include or identify only investment products or alternatives available under the plan or IRA selected by the plan sponsor or an independent financial expert</u> ; and

(D) The asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual

[4] Even where a provider has contracted to provide fiduciary advice, the Department has not required that an independent financial expert itself be a fiduciary. See DOL Adv. Op. 2001-09A ("SunAmerica"). To require fiduciary status here (under the Education Carve-Out) would seem even less warranted.

situations, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments (e.g., equity in a home, Social Security benefits, individual retirement plan investments, savings accounts and interests in other qualified and non-qualified plans) in addition to their interests in the plan or IRA, to the extent those items are not taken into account in the model or estimate.

...

(f) ...

"independent financial expert" means a person who (i) is reasonably familiar with investment principles, products and strategies and (ii) is independent of the party or parties that offer or make available, as part of an investment platform or otherwise, investment alternatives to the plan. For purposes of sub-paragraph (ii) of this section, (A) a person shall be considered independent if it has no financial interest (e.g., compensation, fees, etc.), ownership interest, or other relationship, agreement or understanding that would limit the ability of the party to carry out its responsibilities beyond the control, direction or influence of a party offering or making available investment alternatives under the plan and (B) will not fail to be considered independent of the party offering an asset allocation model merely because it has been retained and will be paid compensation by the party or parties that offer or make available, as part of an investment plan form or otherwise, investment alternatives to the plan if such compensation is not affected by the selection of any specific investment product or alternative.

B. The Department Should Expand the Platform Carve-Out to Include IRAs

The Department has proposed a carve-out for the marketing and offering of a platform of investments in certain very narrow circumstances. Specifically, offering a platform will not constitute fiduciary advice when the platform of securities or other property is made available to the fiduciary of a participant-directed individual account plan employee benefit plan if: (1) the platform is not individualized to the needs of the plan or participants, and (2) the provider discloses in writing that it is not undertaking to provide impartial investment advice or give advice in a fiduciary capacity ("Platform Carve-Out").

In our earlier letter, we urged the Department to extend the Platform Carve-Out to IRAs (and all other types of plans), where (i) the platform provider discloses the characteristics of its IRA platform (*e.g.*, the available asset classes, whether the available options are proprietary, non-proprietary or both, and other limitations on the investments available to the investor), and (ii) after receiving the disclosure, the IRA owner asks to learn more about and/or selects the platform. Implementing such a framework will help ensure that individual retirement investors receive information on the characteristics of an IRA platform and the flexibility to decide which best suits their needs, while retaining a robust market of choices.

We reiterate our earlier comments but also urge the Department to recognize that, unless the Platform Provider Carve-Out is expanded to IRAs, the presentation of asset allocation models populated by an independent financial expert may not be feasible. As a practical matter, it may be very difficult, if not impossible, for any expert to reasonably populate an asset allocation model with all available investments without overwhelming the IRA owner and undermining the benefit of the model as an investment tool unless the IRA provider is permitted to narrow the universe of available options to a manageable number. We, therefore, urge the Department to clarify that the offering of an IRA platform is not, by itself, investment advice.

C. The Department Should Clarify the Seller's Carve-Out

In our earlier letter, Prudential agreed with the Department that it is important 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 adviser, but the seller is making representations about the value and benefits of proposed deals."[5] Consequently, our letter expressed Prudential's support for the Department's inclusion of a safe harbor for incidental advice provided in connection with arm's length sales, purchases, loans or bilateral contracts between plan investors and financial professionals (the "Seller's Carve-Out"). We also urged the Department to expand the Seller's Carve-Out to cover plans of any size and IRAs, and recommended various modifications of the Seller's Carve-Out.

We reiterate our earlier comments. If the Department, however, decides against expanding the carve-out to cover plans of all sizes, we urge the Department to modify the Seller's Carve-Out to:

- Extend the Carve-Out to fiduciaries of plans with fewer than 100 participants if the responsible fiduciary also exercises authority or control with respect to the management or disposition of plan assets of a separate plan of the same plan sponsor that has 100 or more participants. Such an expansion avoids treating the same plan sponsor fiduciary, as a sophisticated consumer for purposes of one plan and not for another merely on the basis of plan size. Companion plans within a sponsor "relationship" are most often managed by the same individual(s) of the employer, and serviced by the same plan recordkeeper. Requiring an entirely different relationship and service scheme across these two plans would be both confusing and frustrating for employer plan sponsors. Such an expansion also avoids the distinct possibility of reduced product and service availability to small plans acquired by larger plan sponsors as part of corporate acquisitions

- Extend the Carve-Out to fiduciaries of multiple plans with fewer than 100 participants if the fiduciary exercises authority or control with respect to the management or disposition of plan assets of plans that, in the aggregate, satisfy the 100 participant threshold. While we are aware of no particular support for a 100 participant threshold, we also are aware of no reason that the Department should insist that it apply on a plan-by-plan basis. Assuming for purposes of argument that the 100 participant threshold is a valid indicator of the presumed sophistication of a plan fiduciary, it should not matter whether the fiduciary owes fiduciary duties to at least 100 participants in a single plan or more than a single plan.

---

[5] 80 Fed. Reg. 21941.

For these reasons, we recommend that the Department consider the following revision to Section (b)(1)(i)(B)(1)–

(1) Obtains a written representation from the independent plan fiduciary that the independent fiduciary

- (i) exercises authority or control with respect to the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act), that the employee benefit plan has 100 or more participants covered under ~~the~~ any one plan of the employer; or
- (ii) exercises authority or control with respect to the management or disposition of employee benefit plan's assets under plans that in the aggregate have 100 or more participants; and

that the independent fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;

D. Best Interest Contract Exemption and PTE 84-24

Given the Department's recent discussions on variable annuities with the Industry and the potential unintended consequences that the Proposals may have on the IRA marketplace, we are revisiting the salient points raised in our July submission related to the BIC Exemption and PTE 84-24. Within the IRA marketplace, and particularly respecting the prominence and value of variable annuities therein, the BIC Exemption presents significant compliance challenges and costs, including seemingly punitive standards, and potentially significant unintended consequences that may deprive or limit access to necessary products and services by IRA owners and plan participants. We have serious concerns about the far-reaching impact of the costs and burdens of complying with the BIC Exemption to avoid violations of ERISA when acting in these newly created fiduciary roles.

Included among the many concerns and suggestions offered in our July submission are that: (i) the Department expand the type of advice recipient whose transactions are covered beyond the retail market to the institutional market; (ii) the Proposals' impartial conduct standard should be aligned with existing standards under ERISA Section 404(a); (iii) the required timing and consent process should be made more flexible to conform with the "realities" of commercial interactions between financial professionals and their clients; (iv) the exemption should reflect the roles of the parties in the various marketing arrangements, such as accounting for the roles of manufacturer and retailer; (v) the Department strike a balance respecting the called for contract warranties to account for the substantial and unduly burdensome costs to the industry of compliance (and likely downstream cost implication to Retirement Investors) while still providing investors protections; (vi) the "broad range of investments" provision should be simplified; and (vii) the overbroad and possibly unhelpful disclosure regime be simplified.

Respecting PTE 84-24, the Proposals preclude advisers from relying on this exemption for recommendations of "securities," including mutual fund shares and variable annuities for sales to IRAs,

while fixed annuities are unaffected, thus creating a different exemption scheme for these two types of annuities. We strongly disagree with the Department's proposed exclusion of variable annuities from this exemption. Variable annuities simply are not the same as pure investment vehicles, and the fact that some annuities are regulated as securities in addition to being regulated as insurance products should provide the Department with comfort as to the sales of these products and not require them to be sold under the BIC Exemption rather than PTE 84-24. Also, because the BIC Exemption conditions are significantly more burdensome than the conditions of PTE 84-24, the Department's proposal to prohibit reliance on PTE 84-24 for variable annuity sales has the effect, inappropriately, in our view, of favoring fixed versus variable annuities. Prudential strongly believes that IRA investors will be well-protected when receiving recommendations as to variable annuities from advisers relying on PTE 84-24. For a further discussion of the importance of PTE 84-24, as well as necessary fixes to the BIC Exemption, please see pages 22 to 38 of our July 21, 2015 submission.

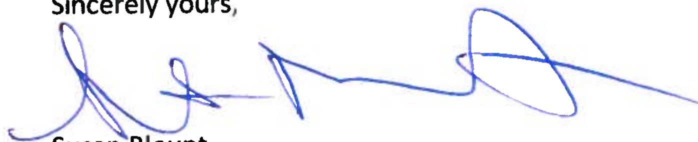
E. The Department Should Confirm New Rules Do Not Apply Retroactively

The Department has already heard from many that the Proposals, if adopted, could prompt product and service providers to revise their offerings to plans, plan participants and IRA owners. If revisions become necessary, it would be disruptive and harmful to retirement investors if product and service providers were to find it necessary to resign from certain service arrangements in order to avoid the risk of fiduciary liability under the Department's sweeping new standards. The Department should clarify that the rules are not retroactively effective and, therefore, the mere holding of assets on or after the effective or applicability date does not subject a party to the new rules in the absence of "advice," as defined in the new rule, following the later of the effective or applicability date. That is, the new rules apply only to "advice" rendered on or after the later of the effective or applicability date, without regard to the holding of plan or IRA assets on the effective date.

******

Prudential appreciates the opportunity to submit comments on the Department's Proposals. Should the Department have any questions or wish to discuss our comments on the Proposals, please contact Robert J. Doyle, Vice President, External Affairs, at robert.j.doyle@prudential.com or 202-327-5244.

Sincerely yours,



Susan Blount
Executive Vice President and General Counsel