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January 2, 2024

By Federal eRulemaking Portal

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Definition of Fiduciary-RIN 1210-AC02
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: Application Nos. D-12060 and D-12057
Suite 400
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, D.C. 20210

Re: Proposed Changes to the Definition of Fiduciary and Related Exemptions

Prudential Financial, Inc. ("Prudential") appreciates this opportunity to comment on the Department of Labor's (the "Department") proposed regulation and accompanying proposed and amended exemptions (collectively, the "Proposals"), which 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] 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. A workable best interest standard along with a definition of investment advice that is reasonable in scope could achieve that goal.

However, we believe that the Proposals present significant obstacles and run counter to the Administration's and Congress' goal of enhancing Americans' retirement security. As we explain below, we strongly believe that the Proposals should be withdrawn to avoid the unintended practical consequences of reducing access to guaranteed lifetime income products and advice when they are most urgently needed by American workers. With Americans living longer and increasingly responsible for managing their own retirement savings, primarily through defined contribution plans and IRAs, policymakers have been concerned over whether Americans' needs for retirement security will be adequately met. Lifetime income products, such as annuities, provide critical ways to help people efficiently spend their savings through retirement. By enabling retirees to set up regular, guaranteed payments for their post-retirement life, lifetime income products serve as a source of predictable income that can help workers manage their money in the decades after they retire. Unfortunately, lifetime income

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

products have not been typically offered as an investment option in defined contribution plans, in part due to employers' perceived legal exposure with respect to regulatory requirements. Through the Setting Every Community Up for Retirement Enhancement ("SECURE") Act, Congress and the Administration aimed to facilitate access to lifetime income products through defined contribution plans by providing a safe harbor for the selection of annuity providers, increased portability and greater clarity regarding disclosure requirements. We believe that the Proposals, particularly revisions to Prohibited Transaction Exemptions ("PTEs") 84-24 and 2020-02, however, run counter to recent Congressional and Administration efforts. In this regard, we strongly urge the Department to withdraw the Proposals as they do not provide meaningful 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.

I. INTRODUCTION

A. Who We Are

Prudential is a financial services leader with a nearly 150-year history and approximately $1.4 trillion of assets under management as of September 30, 2023, with operations primarily 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 life insurance, annuities, retirement solutions, mutual funds, and investment management. We offer these products and services to individual and institutional customers through proprietary and third-party distribution networks.

Prudential's mission and business strategy are largely devoted to helping individuals and families strengthen their financial security, including in retirement. We offer investment products (e.g., mutual funds) and insurance products (e.g., annuities) to help customers accumulate assets for retirement and protect those assets so that they may generate guaranteed income in retirement. We know our customers well and have a strong understanding of why and how they buy or invest in our products. Prudential has gained unique insights into how individuals use and value guaranteed lifetime income. We also have seen lifetime income products help many Americans without traditional pensions prepare for retirement both within defined contribution plans and when investing through their IRAs. Appropriately, much attention has been focused by the Department and others on encouraging individuals to save and accumulate sufficient funds to provide for a secure retirement. Being a good saver, however, is not enough. Savings must last throughout an individual's lifetime. The prospect of outliving one's savings is disconcerting and a real possibility for even the most diligent saver and successful investor. As the Department has recognized in its support for their availability, lifetime income products can provide a very effective way for individuals to ensure that they will not outlive their savings. We urge the Department to ensure that access to lifetime income products is not undermined by the approach taken in the Proposals but is rather encouraged and facilitated.

B. Overview of our Principal Comments

We support consumer protections for retirement investors and have adopted the best interest standard of care through our proprietary distribution channel, but after reviewing the Proposals during this limited comment period, we regretfully conclude that the Proposals should be withdrawn (as have the American Council of Life Insurers, the Insured Retirement Institute, the Committee of Annuity Insurers, the Securities Industry and Financial Markets Association, and the Investment Company Institute, among others). In their current form, the Proposals

would likely have the undesired effect of producing unintended, adverse consequences for American retirement savers, as was seen in the wake of the 2015 proposals, thereby significantly reducing the availability of information, products, and services that such savers need to achieve secure retirement outcomes, particularly guaranteed lifetime income solutions.[2]

The Proposals redefine "investment advice" far too broadly, applying ERISA or ERISA-like standards in a vast range of circumstances never intended by Congress. The Fifth Circuit recently ruled that the hallmark of a fiduciary relationship was a relationship of "trust and confidence" between an investment advice provider and a retirement investor.[3] While we agree with the Department that fiduciary status should "attach only if compensated recommendations are made in . . . circumstances in which the retirement investor can reasonably place their trust and confidence in the advice provider,"[4] the Proposals fail to distinguish such fiduciary relationships from routine sales, marketing, and wholesaling activities and, indeed, erroneously assert that there is no distinction between sales practices and fiduciary investment advice. Although the stated intention is to protect retail investors, especially in the context of a plan to IRA rollover, the text of the Proposals applies far beyond that and makes no distinction between IRA owners transferring a small percentage of assets from an advisory to a brokerage IRA and sophisticated professional fiduciaries negotiating with asset managers on the terms of plan investments. The likely result of this expansive redefinition would be the creation of hundreds of thousands of unexpected investment advice fiduciaries, who would be subject to strict liability for severe prohibited transaction excise tax penalties and other financial consequences, when it appears that the Department is focused on a more limited universe.

The strict liability associated with the fiduciary status that would apply across the industry, due to the breadth of the Proposals, will likely limit conversations critical to the future of American retirement savers. Even the provision of valuable educational information about products and services by wholesalers will likely be diminished by the overbroad reach of the Proposals. Should these Proposals take effect, we believe that there will likely be fewer financial professionals available and/or willing to work with retirement plan investors. Thus, in the aggregate, rather than enhancing retirement security, the Proposals will likely cause consumers to lose access to helpful information, valuable insights, and investment choice, and ultimately bear the costs of implementation of the onerous and unnecessary conditions of the exemptions.

In addition to changing the scope of the investment advice fiduciary definition, the Department proposes new and amended PTEs that require investment advice fiduciaries, including affiliated agents, to utilize PTE 2020-02. Unlike the current version of PTE 84-24, which provides clear exemptive relief for the purchase and sale of annuity contracts by insurance companies or securities issued by registered investment companies, some industry experts do not believe that PTE 2020-02 technically provides that relief. This is particularly concerning since we do not believe that was the Department's intent and a comment period limited by holidays and a hearing in the middle of the comment period does not allow sufficient time to uncover other significant technical issues like this one.

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[2] As one example, see https://hispanicleadershipfund.org/new-research-shows-damaging-effect-of-fiduciary-rule-on-retirement-savings-and-wealth-gap/.

[3] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 370 (5th Cir. 2018).

[4] Retirement Security Rule: Definition of an Investment Advice Fiduciary, 88 Fed. Reg. 75890, 75901 (proposed Nov. 3, 2023).

II. EXISTING REGULATORY PROTECTIONS

We strongly urge the Department to withdraw the Proposals, in part, because we do not believe that the Proposals sufficiently consider the changes that have occurred in the industry since the Department's original proposal in 2010 (withdrawn by the Department after notice and comment on its own accord), nor the 2016 fiduciary rule (vacated by the Fifth Circuit), which have added a robust set of rules to protect retirement investors. For example, the Securities and Exchange Commission ("SEC") promulgated Regulation Best Interest and Form CRS, which became effective during this time in June 2020. That rulemaking package was designed to enhance consumer protections in connection with recommendations of securities products made by licensed financial professionals to retail investors through an enhanced best interest standard of care for broker-dealers (best interest versus suitability) and various disclosures. Both the SEC and The Financial Industry Regulatory Authority have prioritized protection of retail investors and have enforced these regulations on firms not adhering to their robust requirements.

As another example, the following provides a more detailed discussion of the National Association of Insurance Commissioners' ("NAIC") important work during this time. Under NAIC Model Regulation #275, sales of annuities are subject to a best interest standard, which provides retail investors with strong protections by requiring that recommendations are subject to a best interest standard and supervision by insurance companies, similar to SEC Regulation Best Interest/Form CRS. In 2017, as a response, in part, to the Department's 2016 fiduciary rule, the Life Insurance and Annuities (A) Committee of the NAIC established the Annuity Suitability (A) Working Group to review and revise, as necessary, the Suitability in Annuity Transactions Model Regulation (#275) ("NAIC Model Regulation") in an effort to promote greater uniformity across state insurance regulators in connection with the regulation of sales practices for annuities. In 2020, after years of meetings with stakeholders, a revised NAIC Model Regulation was adopted that established a new standard requiring insurers and insurance producers to act in the best interest of the consumer under the circumstances known at the time when making a recommendation of an annuity, without placing the insurer's or the insurance producer's financial interest ahead of the consumer's financial interest. More than forty (40) states have adopted a version of the revised NAIC Model Regulation and thus have adopted the best interest standard.

In addition to a standard of conduct for insurers and insurance producers when recommending annuities, the NAIC Model Regulation requires that insurers, either directly or through a third party, establish or maintain a supervisory system to ensure that the insurance needs and financial objectives of consumers at the time of an annuity transaction are effectively addressed.[5] Insurers and insurance producers are required to maintain records of information collected from the consumer and other information used in making annuity recommendations. Further, insurers and insurance producers are required to make such records available to state insurance regulators for examination.[6] Thus, in addition to setting standards of conduct for sales practices for annuities, state insurance laws require insurers to maintain supervisory systems to ensure that the insurance producers selling and recommending their annuity products comply with the applicable standards of conduct, and to maintain records to demonstrate such

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[5] *See* Section 6.C. of the Model Suitability Regulation (2020) and Section 6.F. of the Model Suitability Regulation (2010).

[6] *See* Section 9 of the Model Suitability Regulation (both 2020 and 2010).

compliance. State insurance regulators exercise strong, meaningful oversight over annuity sales conducted by insurers and insurance producers licensed to sell annuities in their states, including the ability to enforce their laws and order penalties over wrongdoers, which are protective of consumers.

III. DEFINITION OF FIDUCIARY INVESTMENT ADVICE

We strongly urge the Department to withdraw the Proposals as they significantly expand the definition of investment advice fiduciary to include ordinary sales activities without any seller's or sophisticated investor's exceptions and fail to properly consider significant changes that have been implemented by the industry.

In *Chamber of Commerce*, the U.S. Court of Appeals for the Fifth Circuit vacated, *in toto*, the regulatory amendments and new and amended PTEs published in April 2016 (collectively, the "2016 Fiduciary Rule"). The Fifth Circuit unambiguously held that the 2016 Fiduciary Rule conflicted with the text of ERISA and the Code. The Fifth Circuit focused on aspects of the 2016 Fiduciary Rule that, in effect, turned all salespeople into fiduciaries and concluded that this aspect of the 2016 Fiduciary Rule violated ERISA:

> Had Congress intended to abrogate both the cornerstone of fiduciary status–the relationship of trust and confidence–and the widely shared understanding that *financial salespeople are not fiduciaries absent that special relationship*, one would reasonably expect Congress to say so. This is particularly true where such abrogation portends consequences that "are undeniably significant." Accordingly, the [2016] Fiduciary Rule's interpretation of "investment advice fiduciary" fatally conflicts with the statutory text and contemporary understandings.[7]

The Fifth Circuit further stated that "[t]ransforming sales pitches into the recommendations of a trusted adviser mixes apples and oranges."[8] The Proposals do exactly what the 2016 Fiduciary Rule did—they transform ordinary sales pitches into fiduciary recommendations, and given the significant changes required to address this overly broad definition, the Proposals need to be withdrawn. Below we provide just a few of many possible examples of where the overly broad fiduciary investment advice definition inappropriately turns ordinary sales activities and interactions between financial institution counterparties into fiduciary advice.

A. Sales Activities

Under the Proposals, a person provides fiduciary "investment advice" to a retirement investor in several circumstances, including when (a) it makes a recommendation of an investment transaction or strategy under circumstances where it or any affiliate of the person has any discretionary authority or control with respect to purchasing or selling investment property for the retirement investor whether or not pursuant to an agreement, arrangement or understanding or (b)(i) the recommendation is individualized and may be relied upon by the retirement investor as a basis for investment decisions that are in its best interest and (ii) it or

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[7] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d. at 376 (emphasis added).
[8] *Id.* at 382.

an affiliate of such person makes investment recommendations to investors on a regular basis as part of their business.[9]

By including "affiliates," the Proposals could effectively apply to all recommendations including, but not limited to, routine sales, marketing, or informational communications (including those requested by institutional investors), by any entity or person that is part of a diversified financial services provider, which is particularly problematic and inconsistent with prior, long-standing interpretations on how to determine fiduciary status. Under the Proposals, if the asset management division of Prudential has a discretionary relationship with a pension plan, and the same plan seeks information from an affiliate of Prudential on the potential benefits of a pension risk transfer transaction, conversations between Prudential and the pension plan on a pension risk transfer could potentially be fiduciary in nature during what is clearly a sales process even though the plan is represented by a sophisticated fiduciary and also seeking bids from other insurers.

Large financial service providers like Prudential have information walls in place for various reasons, sometimes at a customer's request or to comply with various legal requirements, which make it difficult, if not impossible, to even be aware of affiliated relationships that could automatically result in fiduciary status. Fiduciary status in the above example will therefore attach not because of a relationship of trust and confidence as required by the Fifth Circuit, but instead because an affiliate within a large, global financial institution may have a discretionary relationship with that plan.[10] This will likely have the effect of limiting the amount and quality of information about products and services that plans are currently able to obtain directly from service providers; instead, plans may have to pay to receive that information indirectly through consultants.

Additionally, by extending the scope of fiduciary investment advice to conversations with a retirement investor that include individualized investment information upon which the investor "may rely" as a basis for investment decisions that are in its best interest, the Department has significantly broadened the existing rule to include even more sales and marketing activities. Sales pitches and other marketing and fundraising activities, including requests for proposals in institutional markets, are typically individualized to an extent and information provided in such pitches may be relied upon by a plan investor. In addition, fund offering materials and other governing documents are often sent to plan investors, which alone do not constitute an investment "recommendation." However, such offering materials may be combined with individualized discussions as part of the sales process and under the Proposals, these types of marketing communications could inappropriately be viewed as an "recommendation" to which fiduciary status applies. The overly broad definition of fiduciary

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[9] Retirement Security Rule, 88 Fed. Reg. at 75977.

[10] "Fiduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and client. The concept of fiduciary responsibility dates back to fiducia of Roman law," and "[t]he entire concept was founded on concepts of sanctity, trust, confidence, honesty, fidelity, and integrity." George M. Turner, Revocable Trusts section 3:2 (Sept. 2016 Update). *Chamber of Commerce*, 885 F.3d at 370. Moreover, all relevant sources indicate that Congress codified the touchstone of common law fiduciary status- the parties' underlying relationship of trust and confidence- and nothing in the statute "requires" departing from the touchstone." *Id.* at 369.

investment advice is not helpful to plans or necessary and will sweep in relationships and interactions that neither Congress nor the Fifth Circuit ever intended to be fiduciary in nature.[11]

These types of institutional sales activities represent only a few examples of the Department's significant expansion of the definition of fiduciary investment advice. The inclusion of sales activities is additionally concerning due to the unintended consequences that may result from the fact that the Department has not developed a workable prohibited transaction exemption for such activities. PTE 2020-02 was developed for recommendations to retail investors, and not institutional sales activities or information sharing between large, sophisticated financial institutions. As a result, we strongly urge the Department to withdraw the Proposals to avoid unintended consequences to retirement investors of all sizes who have the knowledge and expertise to understand when they are involved in a sales discussion and benefit from the information that is currently shared across the industry today.

B. Wholesaling Activities

In some cases, Prudential relies on affiliated and unaffiliated wholesalers for its mutual fund, insurance, and annuities businesses to provide important educational information about Prudential's investment and insurance products to affiliated and third-party financial professionals.[12] The financial professional (and not the wholesaler) is responsible for evaluating the retirement investor's individual circumstances and making a best interest recommendation. The wholesaler's sole purpose is to educate the financial professional about product features and to be available to answer product-related questions from the financial professional and/or retirement investor (as long as the retirement investor's financial professional is present). Accordingly, if a Prudential annuities wholesaler is present with a financial professional and that financial professional's client, Prudential requires the wholesaler to state at the beginning of the meeting that, among other things, her/his presence at the meeting is solely to provide product information and education about Prudential's products and further, that he/she cannot recommend a particular product or investment strategy or advise on whether a particular product is right for the customer. Wholesalers do not make a recommendation to the financial professional or to the financial professional's customer. Although wholesalers occupy a critical role in the process to educate retirement investors, they do not have a direct relationship with such investors. The financial professional, not the wholesaler, provides any recommendation to the retirement investor and could be working with wholesalers from multiple different financial institutions to identify an appropriate product solution for the customer. Particularly with respect to annuities and life insurance products, which offer different benefits and guarantees, the wholesalers provide an invaluable service in enabling financial professionals to provide accurate and current information to their customers by educating the financial professionals on the unique features and attributes of the applicable product(s).

We appreciate the Department addressing one, limited form of wholesaling in the preamble, but there are many types of wholesaling. We believe this is another example where the definition of fiduciary investment advice is overly broad and could be viewed to be inclusive of

[11] "Only in DOL's semantically created world do salespeople and insurance brokers have "authority" or "responsibility" to "render investment advice." *Id.* at 373.
[12] As an example, an insurance company wholesaler is a representative of that company who is an expert in describing the features and benefits of the insurer's products. The wholesaler is not authorized to make a sales recommendation to the financial professional or to a customer of the financial professional.

wholesaling activities that are understood by all parties to be part of an educational or sales relationship and not within the confines of a relationship of "trust and confidence" necessary to create a fiduciary relationship with the retirement investor. The possible inclusion of most wholesaling activities is concerning due to the important role that wholesaling plays in benefiting retirement investors by helping financials professionals make best interest recommendations to them. In trying to ensure that best interest recommendations are made to retirement investors, the inclusion of wholesaling activities would undermine that goal by potentially limiting the information available to and analyzed by financial professionals in making such important recommendations. As a result, we once again strongly urge the Department to withdraw the Proposals to avoid unintended consequences to retirement investors who have financial professionals representing them and acting in their best interest and benefit from the information that is currently shared across the industry today, which could be limited going forward.

III. PTE 84-24 AND PTE 2020-02

Since its release, PTE 84-24 has provided complete relief for an insurer relying on the exemption to provide investment advice. PTE 84-24 exempts "[t]he effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company." The exemption provides ERISA section 406(b) relief for conflicts of interest in connection with the sale of an insurance contract or mutual fund. The Department's proposed amendments to PTE 84-24 exclude investment advice fiduciaries from utilizing PTE 84-24 unless they are "independent producers" and can sell the products of at least two insurance companies. The Department stated in the preamble to PTEs 84-24 and 2020-02 that affiliated agents should be able to rely upon PTE 2020-02.[13]

As currently drafted, PTE 2020-02 provides exemptive relief for (1) the receipt of reasonable compensation and (2) the purchase or sale of an asset in a Riskless Principal Transaction or a Covered Principal Transaction, and the receipt of a mark-up, mark-down or other payment. The term "Covered Principal Transactions" in PTE 2020-02 is narrowly defined and only includes the sale of certain specified securities from a financial institution to a retirement investor such as U.S. dollar denominated debt securities, U.S. Treasury Securities, certificates of deposits or interests in unit investment trusts. The Department in the preamble to PTE 2020-02 stated:

> Importantly, certain transactions are not considered principal transactions for purposes of the exemption, and so can occur under the more general conditions. This includes the sale of an insurance and annuity contracts, or mutual fund transaction.[14]

However, preambles are not regulations and interpretations by the Department have changed over the course of time. With the proposed changes to PTE 84-24, the insurance industry should not have to take on the risk of spending significant time, money and resources on compliance with the onerous terms and conditions of PTE 2020-02, only to have the sale of their products be put in jeopardy by a future clarification or informal interpretation by the Department without notice and comment. We believe it is unnecessary to subject a financial

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[13] Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, 85 Fed. Reg. 82798, 82812 (Dec. 18, 2020).
[14] *Id*. at 82816.

professional to a sanctioned list of permissible investment vehicles or instruments under PTE 2020-02 as the professional will be subject to a fiduciary standard of care, and the terms of PTE 2020-02 should expressly cover the purchase and sale of any recommendation covered by the definition of investment advice (e.g., "securities transaction or other investment property"). Technical issues like this one are particularly concerning given the short comment period that the Department provided and further evidence of the need for the Department to withdraw the Proposals.

IV. APPLICABILITY DATE

The Proposal notes that the final rule will be effective 60 days after publication in the Federal Register.[15] This two-month period is highly insufficient to complete all the steps necessary to comply with the Proposals, which include, but are not limited to, evaluating all customer interactions, revising existing policies and procedures, conducting training on the new requirements, developing an entirely new compliance regime for PTE 84-24, updating client disclosures, and putting technology systems and the corresponding testing of those systems changes in place to ensure robust compliance.

Considering the extensive and numerous changes brought about by the Proposals, a much longer period is needed to provide the best chance for effective implementation of the new regulations. A longer period would also be in the interest of avoiding unintended consequences to consumers, mitigating consumer confusion, and promoting administrative compliance. Prudential therefore respectfully requests that the Department provide at least 18 months to comply if the Department decides to move forward with the Proposals.

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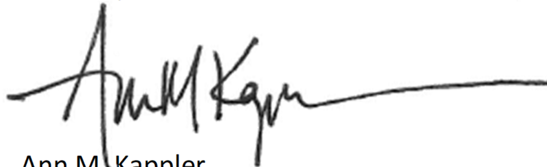
Prudential appreciates the opportunity to submit comments on the Department's Proposals, and we strongly urge the Department to withdraw the Proposals given the concerns that we have expressed along with those expressed in more detail by the American Council of Life Insurers, the Insured Retirement Institute, the Committee of Annuity Insurers, the Securities Industry and Financial Markets Association, and the Investment Company Institute. Should the Department have any questions or wish to discuss our comments on the Proposals, please contact Sarah Burt, ERISA/Benefits Law Chief Legal Officer.

Sincerely,



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[15] Retirement Security Rule, 88 Fed. Reg. at 75912.