Robert J. Doyle
Vice President, External Affairs

Prudential Financial, Inc.
801 Pennsylvania Ave., NW, Suite 800
Washington, DC 20004
robert.j.doyle@prudential.com

Filed via the Federal eRulemaking Portal

August 5, 2020

Office of Exemption Determinations
Employee Benefits Security Administration
Attn: D-12011
U.S. Department of Labor
200 Constitution Avenue N.W., Suite 400
Washington, D.C. 20210

Re: New Investment Advice Interpretations and Fiduciary Investment Advice Exemption [Application No. D-12011]

To whom it may concern:

Prudential Financial, Inc. ("Prudential") appreciates this opportunity to comment on the Department of Labor's (the "Department") proposed fiduciary investment advice ("FIA") exemption and accompanying interpretative guidance on the five-part investment advice regulation (collectively, the "Proposals") .[1] Prudential is a financial services leader with a 145-year history of helping individuals and families strengthen their financial security. Fundamentally, we believe that regulation should provide consumer protections while ensuring plan participants and individual retirement arrangement ("IRA") owners continue to have access to the quality products and services they need for a secure retirement and overall financial wellness. A reasonable definition of "fiduciary" and a workable prohibited transaction exemption are critical to ensuring that goal.

While we appreciate the Department's intent to clarify the current state of the law and afford needed prohibited transaction relief, we believe that certain elements of the Proposals run counter to and present significant obstacles to the Administration's goal of "empower[ing] Americans to make their own financial decisions, to facilitate their ability to save for retirement and build the individual wealth necessary to afford typical lifetime expenses."[2] As we explain below, we strongly believe that the Proposals should be revised to accomplish the objectives stated by the Department and the Administration, and to avoid the unintended practical consequences of reducing participant and IRA owner access to retirement products and services needed to ensure financial security at and during retirement.

---

[1] 85 Fed. Reg. 40834 (July 7, 2020). Please note that any capitalized terms not defined herein shall have the meaning set forth in the Proposals.
[2] *See* Presidential Memorandum on Fiduciary Duty Rule for the Secretary of Labor (Feb. 3, 2017), published at 82 Fed. Reg. 9675 (Feb. 7, 2017).

In general, we are concerned that the Department's newly announced interpretations pertinent to determining fiduciary status depart from well-established interpretations of the Department's 1975 regulation's five-part test[3] and are reminiscent of the fiduciary definition vacated by the Fifth Circuit Court of Appeals in 2018.[4] Moreover, we are troubled by the fact that the Department, on the one hand, purported to reinstate the 1975 rule without change, thereby avoiding a formal notice and comment process,[5] while, on the other hand, simultaneously announced its new substantive interpretations of the five-part test through the preamble to the proposed FIA exemption;[6] that, if not violative of the Administrative Procedures Act, certainly appears inconsistent with the Administration's own requirements on improving agency guidance.[7] Similarly, we are concerned that the conditions of the proposed FIA exemption may be overly burdensome and unnecessarily increase litigation risk. This may ultimately discourage reliance on the exemption by Financial Institutions and, thereby, limit the availability of quality products and services to plan participants and IRA owners.

We respectfully submit comments and suggestions on the Proposals in an effort to further our shared goals of protecting Retirement Investors, while not unnecessarily limiting their ability to achieve retirement security and overall financial wellness through unnecessary regulatory constraints.

I. WHO WE ARE

Prudential is a financial services leader with a long history of helping individuals and families strengthen their financial security. Our purpose is to make lives better by solving the financial challenges of our changing world. At a time when workers are facing a steady reduction in coverage and benefits provided by defined benefit plans, we offer a wide array of financial products and services that help individuals and their families provide for their financial futures.

We offer investment products, such as mutual funds and insurance products to help individuals and their families accumulate assets for retirement and protect those assets so that they may generate guaranteed income in retirement. These financial products and services include fixed and variable annuities, life insurance (including variable life insurance), retirement-related services, mutual funds, investment advisory programs, and investment management products, among other products and services. We offer these products and services to individual and institutional customers through proprietary and third-party distribution networks.

Prudential has more than $1.4 trillion of assets under management as of March 31, 2020 and operates in the United States, Asia, Europe and Latin America. Prudential's retirement business, which provides retirement investment and income products and services for public, private, and non-profit organizations, manages over $400 billion in retirement account values for more than four million plan participants and annuitants as of March 31, 2020. The Company's annuities business is one of the nation's leading variable annuity providers with customer account values of $144 billion as of March 31, 2020. Prudential Advisors has more than 3,000 financial professionals who offer insurance and annuity products, as well as brokerage and investment advisory services to clients in all 50 states.

---

[3] 29 C.F.R. §2510.3-21.
[4] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360 (5th Cir. 2018).
[5] 85 Fed. Reg. at 40590 (July 7, 2020).
[6] *Id*. at 40838-40840.
[7] *See* Executive Order 13891, Promoting the Rule of Law Through Improving Agency Guidance, October 9, 2019.

II. Interpretation of Fiduciary Investment Advice

The preamble to the FIA exemption includes a number of statements concerning the Department's current interpretation of the five-part test. We appreciate the Department's intention to provide guidance on the five-part test, but, as noted, the preamble statements depart from decades of interpretations and do not take into account the Fifth Circuit's recent instruction that a relationship of "trust and confidence" must form the basis of a fiduciary relationship under ERISA and the Code.[8] The preamble statements add new ambiguity to formerly well-settled understandings of how particular factual scenarios would be analyzed under the five-part test.

Particularly troubling is that the Department's new interpretations effectively eliminate the five-part test by rendering ambiguous at best, meaningless at worst, the requirements that advice is provided on a "regular basis", there is a "mutual agreement, arrangement or understanding", and, pursuant to such, the advice provided will serve as the "primary basis" for investment decisions.

We are concerned that Retirement Investors' access to helpful information, valuable advice, and investment choices that are necessary for a secure retirement will be negatively affected as a result. We also are concerned that the Department's introduction of its new interpretations during this period of pandemic and economic uncertainty will not only exacerbate the challenges of access, but impose unnecessary burdens and costs on providers, challenges that could have been mitigated had there been a notice and comment period and, ultimately prospective effective dates. However, we believe that the Department can clarify its statements to provide needed certainty to the regulated community and to enhance Retirement Investors' ability to "make their own financial decisions." We provide a number of requests for clarification below, which we strongly urge the Department to make.

A. Withdrawal of Advisory Opinion 2005-23A ("Deseret")

In the preamble to the FIA exemption, the Department announces that, for purposes of determining fiduciary status, it will no longer apply the analysis set forth in the Deseret advisory opinion and, in support of its position, references a number of policy concerns, in addition to setting forth its new analysis of rollover recommendations.[9] While we may be sympathetic to the policy motivating this change, the fact is that the advisory opinion represented a well-reasoned analysis of the statute upon which the regulated community was entitled to, and did in fact rely on for approximately 15 years. It is unclear to us why the Department would choose to avoid compliance with the Administrative Procedures Act as well as the Administration's own guidance in this area,[10] and informally, and possibly retroactively, apply entirely new interpretations. This could have potentially significant implications under the statute and its prohibited transaction provisions for the regulated community. Accordingly, we are requesting that the Department reinstate Advisory Opinion 2005-23A, pending the adoption of prospectively effective regulatory changes, pursued through a formal notice and comment process. If the Department decides not to take this course, the Department should, in light of the regulated community's longstanding reliance on the Deseret opinion, apply a transition period to its action to allow the regulated community to adjust to the Department's new views.

B. Restore Meaning to the "Regular Basis" Prong

[8] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 369 (5th Cir. 2018).
[9] 85 Fed. Reg. at 40839 (July 7, 2020).
[10] *See* Executive Order 13891, Promoting the Rule of Law Through Improving Agency Guidance, October 9, 2019.

With the introduction of its new interpretation of the five-part test, the Department, in the context of discussing rollovers, appears to render meaningless the "regular basis" prong. While the Department acknowledges that there could be "an isolated and independent transaction" that would fail the "regular basis" prong, the Department goes on to clarify that any transaction in which there is a pre-existing relationship or an "anticipated ongoing" relationship between the participant or IRA owner and a provider would, in the Department's view, satisfy the "regular basis" prong. [11]

Under this interpretation, an investment recommendation that is not considered fiduciary investment advice at the time it is given may later *become* fiduciary in nature if it is followed up with additional investment recommendations at some point in the future. We are concerned that an interpretation of the five-part test that would apply fiduciary status on a retroactive basis, or for that matter, to routine sales activity, does not comport with the text of ERISA and long-standing case law, up to and including the Fifth Circuit decision. Moreover, this interpretation would harm Retirement Investors, because it could severely limit their access to future assistance in assessing important financial decisions.

The Fifth Circuit's opinion provides a clear holding that the following factual scenario cannot give rise to fiduciary investment advice under ERISA and the Code:

> a broker-dealer otherwise unrelated to an IRA owner tells the IRA owner, "You'll love the return on X stock in your retirement plan, let me tell you about it" (the "investment advice"); the IRA owner purchases X stock; and the broker-dealer is paid a commission (the "fee or other compensation").[12]

Similarly, the Fifth Circuit held that a salesperson's recommendation to rollover would not constitute fiduciary investment advice under the five-part test.[13] The opinion follows from and accords with numerous prior court decisions holding that "[s]imply urging the purchase of its products does not make [a Financial Institution] an ERISA fiduciary . . . ."[14] The reason these sales activities cannot give rise to a fiduciary status under ERISA and the Code, as the Fifth Circuit explains, is that "[f]iduciary status turns on the existence of a relationship of trust and confidence between the fiduciary and client."[15] And routine sales activities cannot give rise to a relationship of trust and confidence.[16] The Fifth Circuit specifically noted that at common law a relationship of trust and confidence must exist at the time advice is given in order for fiduciary status to be present.[17]

The Department's interpretation of the five-part test does not adequately account for the requirement, under ERISA, the Code, and controlling case law,[18] that for fiduciary status to be present, a relationship of trust and confidence must exist at the time advice is given. The Department appears to believe that a sales interaction should be retroactively re-framed as fiduciary advice, if, subsequent to the

[11] 85 Fed. Reg. at 40839–40 (July 7, 2020).
[12] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 369 (5th Cir. 2018).
[13] *Id*. at 380.
[14] *Am. Fedn. of Unions Loc. 102 Health & Welfare Fund v. Eq. Life Assur. Soc. of the U.S.*, 841 F.2d 658, 664 (5th Cir. 1988); *see also Cotton v. Massachusetts Mut. Life Ins. Co.*, 402 F.3d 1267, 1279 (11th Cir. 2005); *Consol. Beef Industries, Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 965 (8th Cir. 1991).
[15] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 370 (5th Cir. 2018).
[16] *Id.* at 380.
[17] *Id. at* 382 n.15 (quoting *Schlumberger Tech. v. Swanson,* 959 S.W.2d 171, 177 (Tex. 1997) (holding "the [fiduciary] relationship must exist prior to, and apart from, the agreement made the basis of the suit")).
[18] *Id.*

interaction, advice is given. But the trust and confidence requirement reflects the fact that the standard of care applicable to a fiduciary relationship should only follow from an advice recipient's reasonable trust or reliance on the advice when considering whether to accept the advice. For example, in the scenario described by the Fifth Circuit and quoted above, the IRA owner does not have a reasonable basis to rely on or trust the recommendation provided by the broker-dealer when deciding whether to accept the recommendation, because the IRA owner has no prior relationship with the broker-dealer establishing trust and reliance. Similarly, a Retirement Investor does not have a relationship of trust and confidence with an Investment Professional they meet for the first time to discuss a rollover. The five-part test's regular basis prong rightfully recognizes that a relationship of trust and confidence is formed over time. Therefore, an interpretation of the five-part test that would apply fiduciary status to an initial investment recommendation retroactively is not correct.

Additionally, ERISA Section 409(b) provides that a fiduciary cannot be held liable for activity that occurred before he or she became a fiduciary. An interpretation of the five-part test that would apply fiduciary status retroactively would conflict with Section 409(b), because it would potentially subject Investment Professionals and Financial Institutions to fiduciary liability for activities they engaged in before they were fiduciaries with respect to a particular Plan or IRA. On a broad level, retroactive application of law contradicts basic notions of fairness and due process.[19]

Practically speaking, retroactive application of fiduciary status could unintentionally limit advice provided to Retirement Investors across the industry given the administrative complexities presented by the Department's new interpretation. Prior to interacting with a Retirement Investor, a Financial Institution would first be required to determine whether it has communicated with the Retirement Investor in the past. If the prior communication could be construed as involving an investment recommendation, the Financial Institution would need to analyze the implications of that investment recommendation being transformed into fiduciary investment advice and whether the recommendation may involve a non-exempt prohibited transaction. If treating the prior recommendation as fiduciary investment advice would raise compliance issues, the Financial Institution would be required to limit its interactions with the Retirement Investor including, if relevant, to only provide investment education. We believe such a requirement would negatively impact a Retirement Investor, who may approach several Investment Professionals seeking information or product offerings and comparing those offerings before determining which Investment Professional to engage with for the purpose of investment advice. On a going forward basis when interacting with new Retirement Investors, the prospect of retroactive application of fiduciary status would impose similarly considerable administrative complexities. A Financial Institution may intend in good faith that it will interact with a Retirement Investor on only a one-time basis, but circumstances may change, and it is not possible to predict the future.

The foregoing administrative complexities could harm Retirement Investors and impede the Administration's objective of empowering Retirement Investors to make their own financial decisions when saving for retirement. Retirement Investors desire personalized advice and information to assist them in making important financial decisions, as well as access to guaranteed lifetime income solutions to withstand financial emergencies. However, the Department's interpretation of the five-part test would add uncertainty to interactions with Retirement Investors and could limit the assistance made available. We therefore request that the Department clarify that fiduciary status under the regular basis prong of the five-part test is determined at the time the advice is given and only applies prospectively.

The Department's statements regarding the regular basis prong, as well as its omission of any mention of a trust and confidence relationship as a pre-requisite to fiduciary status, raise significant

[19] *Calder v. Bull*, 3 U.S. 386 (1798) (stating that "it is a good general rule, that a law should have no retrospect").

questions concerning the five-part test that we believe warrant additional guidance. We also request that the Department clarify that marketing communications and promotional literature, as well as routine sales presentations that do not include recommendations with respect to "securities or other property," are not considered covered advice under the five-part test, and cannot be combined with one other investment recommendation to meet the "regular basis" prong of the five-part test. The Department clarified that such communications were not to be considered covered advice under its 2016 fiduciary investment advice regulation.[20] Moreover, marketing, promotional literature, and sales presentations do not reflect a relationship of trust and confidence.

Further, we request that the Department clarify that the manner in which an Investment Professional or Financial Institution is compensated does not impact whether the regular basis prong of the five-part test is met. The Department stated that insurance agents may receive trailing commissions when they provide advice to Retirement Investors on a regular basis.[21] This statement fails to recognize that insurance agents may decide to receive trailing commissions for personal reasons wholly unrelated to their relationship with a Retirement Investor – the same amount of compensation can be paid once, over time, or through a combination of upfront and trail commissions and is paid regardless of whether the agent subsequently provides additional advice to a Retirement Investor. Whether the regular basis prong is met should depend on whether investment recommendations are in fact provided on a regular basis, not on the manner in which Investment Professionals are compensated. Moreover, trailing commissions are paid by insurance companies, not by Retirement Investors. The payment of a trailing commission has no connection to whether a relationship of trust and confidence is present.

C. Restore Meaning to the "Primary Basis" Prong

Again, without amending the five-part test and without the benefit of notice and comment, the Department, through its new interpretive guidance, would, consistent with the vacated regulatory effort of the prior Administration, effectively remove the "primary basis" prong from the five-part test by, for the first time in more than 40 years, putting emphasis on reading "a primary basis" as supportive of a view that there can be multiple "primary basis."[22] First, such a reading ignores the most natural reading of the "primary basis" prong. The definition of the term: "of **first** rank, importance, or value," limits the concept of primary to a singular item.[23] We note that the Department itself recognized such a reading when, in the 2016 preamble discussion justifying the elimination of the "primary basis" prong, the Department acknowledged the difficulty of establishing fiduciary status by having to prioritize advice when multiple advisors are consulted.[24] This view is further reinforced by the fact that throughout the Fifth Circuit Court of Appeal's decision the Court referenced the primary basis test as "the" – not an "a" - primary basis test.[25]

We have serious concerns about the suggestion that there may be multiple "primary bases" for

[20] 81 Fed. Reg. 20946, 20979 (Apr. 8, 2016).
[21] 85 Fed. Reg. at 40840, n. 41 (July 7, 2020).
[22] *Id.* at 40840.
[23] Primary, Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/dictionary/primary (*emphasis added*).
[24] 81 Fed. Reg. 20955, 20956 (Apr. 8, 2016).
[25] *Chamber of Com. of U.S. of Am. v. U.S. Dept. of Lab.*, 885 F.3d 360, 369, 380 (5th Cir. 2018).

an investment decision.[26] Such an interpretation, not unlike the prior Administration's regulatory effort, appears to be an attempt to expand the five-part test in order to capture more interactions than are warranted under the plain language and meaning of the Department's investment advice regulation.

Moreover, while we appreciate the Department's attempts to generally align the Proposal with the efforts of other regulators, including the Securities and Exchange Commission ("SEC"),[27] it is important to recognize that the SEC's Regulation Best Interest ("Regulation BI") does not impose a fiduciary status on broker-dealers—the SEC could have but affirmatively decided not to impose a uniform fiduciary standard on broker-dealers.[28] The different fiduciary status for broker-dealers under the SEC's Regulation BI and the Department's Proposal could cause investor confusion and, as a result, we are concerned with the Department's statement in the preamble to the Proposal that "[w]hen financial service professionals make recommendations to a Retirement Investor, particularly pursuant to a best interest standard such as the one in the SEC's Regulation Best Interest, or another requirement to provide advice based on the individualized needs of the Retirement Investor, the parties typically should reasonably understand that the advice will serve as at least a primary basis for the investment decision."[29]

Further, compliance with the SEC's Regulation BI should not be deemed to trigger the primary basis prong of the five-part test. Long-standing interpretations of the five-part test hold that the facts and circumstances—particularly whether advice was relied upon—control whether the primary basis prong has been met.[30] This is consistent with the requirement that a relationship of trust and confidence be present as a pre-requisite to fiduciary status under ERISA and the Code. Moreover, the Department's statement appears to suggest that the primary basis prong would always be met if the individualized advice prong is met. Such view reinforces the perception that the Department is attempting to undermine the five-part test and, thereby amend the 1975 regulation without undertaking the required process under the Administrative Procedure Act. We, therefore, request that the Department clarify that the primary basis prong of the five-part test is determined based on the facts and circumstances, not on whether the Investment Professional or Financial Institution is required to comply with Regulation BI or any other applicable regulations, and not on whether the advice has been individualized.

D. Restore Mutual Agreement, Arrangement or Understanding Prong

In its further discussion of the five-part test, the Department expresses the view that, while appropriately considered, "[w]ritten statements disclaiming a mutual understanding or forbidding reliance on the advice as a primary basis for investment decisions are not determinative."[31] We are concerned that the Department's views, as articulated in the preamble, do not give sufficient deference to the importance of contractual arrangements and minimize the significance of contracts clearly delineating the scope and nature of services to be provided, and perhaps not provided, as well as the capacity in which such services will be provided.

The vacated 2016 fiduciary rule similarly undervalued the importance of agreements, arrangements and understandings of the parties. In this regard, we request that the Department recognize the clarity and certainty contracts bring to an engagement and affirm that agreements,

---

[26] 85 Fed. Reg. at 40840 (July 7, 2020).
[27] *Id.* at 40856 (July 7, 2020).
[28] 84 Fed. Reg. 33318, 33322 (July 12, 2019).
[29] 85 Fed. Reg. at 40840 (July 7, 2020).
[30] *Brink v. DaLesio*, 667 F. 2d 420 (4th Cir. 1981); *Harris Trust & Savings Bank v. Salomon Brothers, Inc.*, 813 F. Supp. 1340, 1343 (N.D. Ill. 1992).
[31] 85 Fed. Reg. at 40840 (July 7, 2020).

arrangements and evidenced understandings of the parties will be dispositive in the absence of fraud, misleading statements, or incapacity.

III. Proposed Investment Advice Exemption

We have long supported a workable best interest standard and support the establishment of a broad-based investment advice exemption with workable conditions that both protect consumers while facilitating their access to various quality products and services. We believe that the Proposal should be revised in several respects to achieve this goal. We include our comments and suggestions below.

A. Revise and Clarify Pre-Transaction Disclosure Requirements

Section II(b) of the Proposal requires a written acknowledgement of fiduciary status, description of the services to be provided, and description of material conflicts of interest prior to engaging in a transaction covered by the FIA exemption. Under this provision, the Proposal will not be available where the transaction involves an inadvertent fiduciary. We believe Retirement Investors will benefit from broadening this Proposal to cover inadvertent fiduciaries, because more Financial Institutions will likely rely on the FIA exemption as evidenced by the industry's long-standing practice of proactively relying on prohibited transaction exemption 84-24.

The exclusion of inadvertent fiduciaries is particularly problematic for providers given the ambiguities and uncertainties attendant to fiduciary status under the Department's new interpretation of the five-part test, discussed above. Even providers who opt to provide some services as a fiduciary will be challenged in ensuring their non-fiduciary services do not cross the fiduciary/investment advice line. Under the Proposal, the Department is effectively requiring providers to assume fiduciary status, without regard to their actual or intended services, in order to take advantage of prohibited transaction relief that will protect them against having to disgorge profits and pay onerous excise taxes in the event of an inadvertent act. We believe this may be an unintended intrusion into the ability of parties to agree to what services will be provided and the manner in which those services will be provided. We also believe, as noted above, that extending the Proposal to persons or entities that, despite intentions to the contrary, might become fiduciaries is a win-win. More Retirement Investors will be afforded the protections flowing from compliance with the exemption and the inadvertent fiduciary has the benefit of the exemption's coverage.

Moreover, a requirement to acknowledge fiduciary status brings with it increased risks, and therefore costs, that, ultimately, may limit access to personalized investment advice and products that may be appropriate for Retirement Investors, including lifetime income solutions. If Financial Institutions were not required to state that they were fiduciaries, then they would more likely opt to comply with the terms of the Proposal, as noted above. However, a requirement to acknowledge fiduciary status would in almost all cases cause Financial Institutions to become fiduciaries under the five-part test and could increase the risk of fiduciary status under other regulatory regimes. Where Financial Institutions do not desire to act as fiduciaries under the exemption or unless the Department restores meaning to the "regular" and "primary" basis prongs, they could then be forced to limit their interactions with Retirement Investors rather than complying with the protective conditions of the Proposal. This would mean Financial Institutions would provide only basic (if any) information to Retirement Investors, rather than valuable, personalized advice and information on specific products based on their needs. As such, the fiduciary acknowledgment appears to conflict with and frustrate the Administration's stated policy of empowering Retirement Investors to make their own financial decisions.

Given that most service providers will be providing the disclosures set forth in subparagraph Section II(b)(2), relating to a description of services, we recommend that the Department merge the concepts of subparagraphs (b)(1) and (2) to require "a written description of the services to be provided, including any anticipated fiduciary services, and the Financial Institution's and Investment Professional's material Conflicts of Interest that is accurate and not misleading in all material respects." We further request that the Department clarify that, for purposes of ERISA-covered plans, the disclosures required by ERISA section 408(b)(2) will be deemed to satisfy this disclosure obligation.[32]

With regard to non-ERISA plans, we request that the Department avoid investor confusion that would result from multiple disclosures and clarify that compliance with the comprehensive disclosure requirements under the securities laws applicable to broker-dealers and registered investment advisers will be deemed to meet the disclosure requirements.

We note that broker dealers and registered investment advisers are required to provide Form CRS to customers at the beginning of the customer relationship.[33] Disclosures concerning conflicts of interest arising from fees and costs, for example, must be included in Form CRS.[34] Statements regarding conflicts arising from proprietary products, third-party payments, revenue sharing, and principal trading are also required to be included to the extent applicable.[35]

To supplement Form CRS, Regulation BI requires that broker-dealers disclose, prior to or at the time of a recommended transaction all material facts relating to conflicts of interest that are associated with the recommendation.[36] Additionally, broker-dealers must establish, maintain, and enforce policies and procedures reasonably designed to identify conflicts of interest for purposes of disclosure.[37] The SEC described that conflicts of interest arising from compensation practices and the recommendation of proprietary products, among other things, must be disclosed.[38] For registered investment advisers, Form CRS supplements pre-existing requirements to disclose conflicts of interest in Form ADV Part 2A.[39]

Accordingly, broker-dealers and registered investment advisers are already subject to comprehensive conflicts of interest disclosure requirements that overlap with the requirement to disclose conflicts of interest in the Proposal. To support the Department's intent to align the Proposal with other regulations and avoid investor confusion resulting from multiple disclosures, the Department should clarify that compliance with the conflict of interest disclosure requirements applicable to broker-dealers and registered investment advisers would be deemed to satisfy the Proposal's conflicts of interest disclosure requirement.

B. Remove or Modify the Retrospective Review Requirement

[32] See 29 C.F.R. §2550.408b-2(c).
[33] 17 C.F.R. §§ 240.17a-14; 275.204a-5.
[34] 84 Fed. Reg. 33492, 33526 (July 12, 2019).
[35] *Id*. at 33533 (July 12, 2019).
[36] 17 C.F.R. §240.15*l*–1(a)(2)(i)(B)
[37] *Id.* at §240.15*l*–1(a)(2)(iii).
[38] 84 Fed. Reg. at 33362–64 (July 12, 2019).
[39] SEC, General Instructions For Part 2 of Form ADV, *available at* https://www.sec.gov/about/forms/formadv-part2.pdf.

Section II(d) of the Proposal would require Financial Institutions to conduct an annual retrospective compliance review memorialized in a written report presented to the Financial Institution's Chief Compliance Officer ("CCO") and Chief Executive Officer ("CEO"). The CEO would need to certify review of the report and make certain findings regarding the Financial Institution's policies and procedures regarding compliance with the Proposal.[40] The report would need to be provided to the Department within 10 business days of a request.[41]

It is unclear why the Department is seeking to impose this oversight requirement in the Proposal. The Department cites to no evidence of broad noncompliance with regard to prohibited transaction exemptions generally or that Financial Institutions routinely fail to take their compliance efforts seriously. Rather, the Department merely cites similar regulatory regimes and that compliance costs for the proposed requirement will be "negligible."

The fact is that Financial Institutions, particularly publicly traded ones, make significant resource and financial commitments to ensuring compliance with applicable laws. Noncompliance not only presents legal and financial risks, but also reputational risks for most such institutions. Noncompliance with the conditions of a prohibited transaction exemption brings additional risks, including significant, self-effectuating excise tax liabilities. Thus, it is our view that the review requirement is not necessary to ensure that Financial Institutions comply with the exemption and should be eliminated from the Proposal.

With regard to the burdens and costs, and despite the Department's apparent beliefs to the contrary,[42] the imposition of the review requirements on Financial Institutions will result in costs and burdens that are considerably greater than "negligible." The mere fact that other regulatory regimes may have similar, but not identical, requirements does not translate into significant reductions in the costs and burdens that would be attendant to an on-going, annual review of compliance with a prohibited transaction exemption. In this regard, the Department estimates, for large firms, that it will take a legal professional 10 hours to produce a report and 30 minutes to review and certify such report.[43] We believe the Department significantly understates both the time for the compliance review and the review and certification of the produced report based on our prior experiences with similar audits.

Implementing a process for an internal audit – or an audit of any type – at any large Financial Institution, including Prudential, requires intensive coordination between various parties, including legal professionals, compliance personnel, and employees in the businesses who have access to relevant information. Even after initial implementation of such a process, audits, depending on their nature and requirements, may require activities such as status meetings, selection of representative samples of transactions, thorough evaluations of each selected transaction, evaluations of strength of relevant practices and procedures, preparation of relevant reports and certifications, and explanations of such reports and certifications to the signatories. As such, we believe a more realistic estimate, particularly given the review itself would be a condition of the exemption and therefore held to very high standards internally, could be at least five times that estimated by the Department for legal review, and, at the very least, twice that contained in the Department's estimate for completion of the certification(s). Given the size of Prudential's investment advice programs, we anticipate that the numbers could be even greater.

If, despite the foregoing, the Department nonetheless retains the retrospective review requirement, we request that the Department revise the requirements so that certification of the report

[40] Proposal §II(d)(3).
[41] Proposal §II(d)(5).
[42] 85 Fed. Reg. at 40860 (July 7, 2020).
[43] *Id*. at 40854, n. 105.

would be provided by a person with personal knowledge of the Financial Institution's compliance policies and procedures, such as the CCO. The CEO's responsibilities are too-wide ranging to include detailed personal knowledge of the issues required to be certified. Further, given the breadth of the CEO's role, requiring him or her to complete the certification could dramatically increase the time and resources required to complete the audit. Additionally, while the preamble to the Proposal states that the CEO would be permitted to receive advice prior to making the certifications, the certifications would be more meaningful if they were made by individuals with necessary expertise to assess compliance with the exemption.

Finally, we request that the Department include a good faith compliance standard and extend the timeframe with respect to the requirement to produce the annual review to the Department. If the request is delivered to an individual without knowledge of the Proposal or authority to release the annual review materials, it may take longer to respond. Therefore, we request Section II(d)(5) be modified as follows:

> (5) The Financial Institution retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 15 business days of request. However, a Financial Institution's failure to provide such materials shall not result in loss of the exemption provided that the Financial Institution provides the materials within a reasonable time following the discovery of such failure.

C. Clarify the Scope of the Exclusion on Discretionary Fiduciaries

Under Section I(c)(3), the Proposal would not be available where the transaction involves the Investment Professional acting in a fiduciary capacity other than as an investment advice fiduciary. We believe this exclusion was inserted to clarify that the Proposal is only available in connection with non-discretionary investment advice. However, there are circumstances where a Financial Institution may be engaged to provide discretionary investment management (i.e., managed account) services to plan participants, but the managed account services would not include authority to initiate a rollover of the participant's account. To the extent a participant terminates employment, we believe that the Financial Institution's recommendation that the participant rollover to a managed account would be a separate "transaction" from the transactions by which the Financial Institution provides discretionary investment management services, and therefore the rollover recommendation would not be excluded from coverage under the Proposal. We respectfully request that the Department confirm this view to protect Retirement Investors who could otherwise be excluded from the receipt of personalized investment advice that satisfies the protective standards of the Proposal.

D. Robo-Advice Should Be Covered

Pursuant to Section I(c)(2), the Proposal is not available in connection with any transaction that results from investment advice generated solely by an interactive website in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website, without any personal interaction or advice with an Investment Professional (*i.e.,* robo-advice).[44] However, robo-advice has the potential to deliver personalized, professional investment advice to Retirement Investors at low cost. The exclusion of robo-advice could harm Retirement Investors by making the service less available. The Department states that it elected to

[44] Proposal §I(c)(2).

exclude robo-advice from the Proposal, because it is covered by ERISA's statutory investment advice exemption.[45] However, the industry has generally not viewed the statutory exemption as providing a workable alternative, and the Proposal covers investment products that are currently covered by other prohibited transaction exemptions.[46] In order to assist Retirement Investors in "making their own financial decisions" we request that the Department ensure that the Proposal is product neutral by removing the robo-advice exclusion.

E. Access to Records Should be Limited

Section IV(a) states that records demonstrating compliance with the FIA exemption shall be maintained for six years.[47] The Department explains in the preamble that such requirements are necessary so that parties relying on the exemption can demonstrate, and the Department can verify, compliance with the exemption. Section IV further provides that the documents supporting compliance shall be made available to, in addition to the Department's employees, the following or their authorized representatives: plan fiduciaries, contributing employers, employee organizations, any participant or beneficiary or IRA owners.[48]

We note that the Department provides no rationalization in the preamble or elsewhere for why such parties should be afforded access to compliance-related documents. The Department, not the delineated parties, has the authority to interpret and administer the terms of the exemption. Disclosure to the listed parties therefore will not provide meaningful protections to Retirement Investors. However, the Department appears, through the establishment of such a broad disclosure obligation, to be enlisting such persons and their legal counsel in the Department's enforcement efforts. In this regard, we are concerned that, contrary to the expressed intent of the Department,[49] such disclosure requirements will only further the second-guessing of Financial Institutions' policies and procedures and compliance therewith, and will promote frivolous litigation, thereby, increasing litigation risks and, ultimately, unintended consequences for Retirement Investors. To the extent that an actual controversy exists regarding a Financial Institution's compliance with the conditions of the FIA exemption and such parties have a legitimate need for these documents, they can seek to obtain them through discovery procedures that are monitored by a court. We do not believe that subjecting Financial Institutions to ungoverned and unmonitored pre-litigation discovery will promote the objectives of the FIA exemption. We, therefore, recommend that access to records under Section IV be limited to those agencies with direct enforcement responsibility for prohibited transaction exemptions.

Further, while the Proposal would provide a method to protect trade secrets and privileged information from disclosure, the Proposal sets Financial Institutions up for inadvertent noncompliance by requiring Financial Institutions to provide a written response within 30 days regardless of whether the request was delivered to an appropriate person within the Financial Institution who understands the Proposal and who has authority to respond. In this regard, we request that the Department include a good faith compliance standard with respect to the requirement to produce records within 30 days, given the possibility that requests could be delivered to people without knowledge of the exemption's requirements or authority to release the requested documents. In this regard, we suggest the following lines be added to Section IV(b):

---

[45] ERISA §§ 408(b)(14); (g).

[46] *See, e.g.*, PTE 77-4; PTE 84-24.

[47] 85 Fed. Reg. at 40864 (July 7, 2020).

[48] *Id.*

[49] *Id.* at 40842, n. 49.

(3) A Financial Institution's failure to provide the notice described in paragraph (2) of this Section before the close of the thirtieth (30^{th}) day shall not result in loss of the exemption provided that the Financial Institution provides such notice within a reasonable period of time following the discovery of such failure.

Finally, the Department should not be permitted to request records relating to transactions involving IRAs, where it does not have enforcement jurisdiction. The Department should take the approach it did with the Best Interest Contract Exemption where it permitted the Internal Revenue Service to obtain such records instead. Accordingly, we request that the following changes be made to Section IV:

Section IV—Recordkeeping

(a) The Financial Institution maintains for a period of six years records demonstrating compliance with this exemption and makes such records available, to the extent permitted by law including 12 U.S.C. 484, to the following persons or their authorized representatives:

(1) Any authorized employee of the Department, *with respect to transactions involving Plans*; *or*
(2) *Any authorized employee of the Internal Revenue Service, with respect to transactions involving IRAs*

F. The Department Should Adopt a Good Faith Compliance Standard

We further request that the Proposal incorporate a good faith compliance standard in connection with the Proposal's disclosure and policies and procedures requirements. Financial Institutions and Investment Professionals should be able to rely on the Proposal provided that they act in good faith and with reasonable diligence in their compliance efforts and correct any errors within reasonable time periods after detection. The Department has adopted a good faith compliance standard in other contexts, including the Department's 408b-2 compensation disclosure regulation, 404a-5 participant disclosure regulation, and the insurance company general account regulation.[50] We request that Section II be amended to add:

> *A Financial Institution's failure to provide the required disclosures or include a provision in its policies and procedures, despite good faith compliance with that provision in practice, shall not result in loss of the exemption provided that the Financial Institution provides the disclosures and/or updates its policies and procedures within a reasonable time following the discovery of such failure.*

G. Remove Extraneous Enforcement Provisions

Throughout Section III of the Proposal, relating to eligibility, the Department has included various enforcement provisions that are unnecessary and only serve to increase compliance complexity, costs, and burdens, along with compliance uncertainty, under the FIA exemption. Most, if not all, do nothing to enhance the protections for Retirement Investors given that the enforcement mechanisms currently in place, such as the Department's authority under ERISA Sections 502 and 411, as well as the excise tax provisions of Code Section 4975. Thus, it is unclear why the Department is seeking to impose such requirements as part of the Proposal. The Department cites to no evidence of broad noncompliance with

[50] 29 C.F.R. §2550.408b-2(c)(1)(iv)(F)(2); 29 C.F.R. §2550.408b-2(c)(1)(vii); 29 C.F.R. §2550.404a-5(b)(1); 29 C.F.R. §2550.401c-1(i)(5).

regard to prohibited transaction exemptions generally or that Financial Institutions routinely fail to take their compliance efforts seriously. In the interest of bringing simplicity, clarity and certainty to the Proposal, we encourage the Department to re-evaluate the need for such provisions.

H. Remove the Best Execution Condition

Section II(a)(2)(B) of the Proposal requires, among other things, that the Financial Institution and Investment Professional seek to obtain best execution. In setting forth this requirement, the Proposal specifically acknowledges that it applies "as required by the federal securities laws." We do not believe this condition is necessary, because it is only a requirement to comply with other requirements already applicable to Financial Institutions and Investment Professionals under the securities laws. Therefore, the condition does not provide any meaningful protections to Retirement Investors, and we request that it be removed.

I. The Department Should Retain Field Assistance Bulletin ("FAB") 2018-02 for at Least one Year

We agree with the Department's decision to retain the temporary non-enforcement policy set forth in FAB 2018-02.[51] To provide Financial Institutions with a transition period to allow them to come into a compliance, we respectfully request that the Department continue to retain FAB 2018-02 for at least one year following the publication of the final FIA exemption.

******

Prudential appreciates the opportunity to submit comments on the Department's Proposals. Should the Department have any questions or wish to discuss our comments, please contact Sarah Burt, Chief Legal Officer, ERISA/Benefits Law at sarah.burt@prudential.com.

Sincerely yours,

/s/ Robert J. Doyle

Cc: Jeanne Klinefelter Wilson, Assistant Secretary
Timothy Hauser, Deputy Assistant Secretary
Lyssa Hall, Director of Exemption Determinations
Joe Canary, Director of Regulations and Interpretations

[51] 85 Fed. Reg. at 40836 (July 7, 2020).