Prudential

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Submitted by Email:
EBSA.FiduciaryRuleExamination@dol.gov.

U.S. Department of Labor
200 Constitution Avenue N.W.
Washington, DC 20210

Re: EBSA RIN 1210-AB82
Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions

Ladies and Gentlemen:

Prudential Financial, Inc. ("Prudential") appreciates the opportunity to comment on the issues raised by the U.S. Department of Labor (the "Department") in its July 6, 2017 Request for Information ("RFI")[1] relating to the definition of "fiduciary" and the related prohibited transaction exemptions adopted on April 8, 2016 (the "Rule") and the need for changes thereto.[2]

Prudential was founded in 1875 on the belief that financial security should be within reach for everyone. More than 140 years later, our purpose remains to help people, organizations and communities realize their ambitions. Prudential has a long history of helping Americans prepare for their retirement and today we are a leading provider of guaranteed lifetime income solutions both in defined contribution plans and Individual Retirement Arrangements ("IRAs").

We agree that Americans face significant challenges in saving for retirement. That is why Prudential remains committed to helping Americans achieve a more secure financial future. As such, we support regulation that protects the interests of consumers and enables us to provide products and services that will meet their needs. Fundamentally, we believe that regulation should provide consumer protections while ensuring plan participants and IRA owners continue to have access to the quality products and services they need for a secure retirement.

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[1] See Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions (82 Fed. Reg. 31278, July 6, 2017).
[2] 81 Fed. Reg. 20946.

As noted in our July 20, 2017 letter to the Department in support of an extension of the January 1, 2018 applicability date,[3] we have devoted significant resources to comply with the Rule. Our efforts have underscored for us, and we believe the financial services industry generally, the complexity of the Rule, the need for significant and meaningful revisions to the Rule and the potential unintended consequences for existing and potential plan participants and beneficiaries, IRA owners and plan fiduciaries. Thus, it continues to be our view that the Rule presents significant obstacles to the intended goal of enhancing Americans' retirement security. The Department should not interpret our substantial compliance efforts as an indication that our concerns regarding the unnecessarily complex and burdensome Rule are inconsequential or have been mitigated.

The comments contained herein are intended to bring to the Department's attention some of the issues of significant concern to us and to offer potential paths forward to a more balanced rule that protects the interest of consumers while mitigating potential unintended consequences for existing and potential plan participants and beneficiaries, IRA owners and plan fiduciaries.

Definition of Fiduciary

Fundamentally, we believe many of the challenges facing participants and beneficiaries, IRA owners, and plan fiduciaries are rooted in the overly broad and ambiguous approach taken to defining who is a "fiduciary" for purposes of ERISA section 3(21)(A)(ii).

First, the definition unnecessarily limits the ability of parties to mutually agree on the capacity in which services will be provided to a plan, plan fiduciary, participant or beneficiary or IRA owner, by imposing fiduciary status on many communications simply because they are "directed to" a specific recipient or recipients.[4] The "directed to" paragraph of the definition, not only undermines the ability of parties to freely contract or mutually agree, but it also adds a new level of ambiguity that effectively raises the possibility that any direct, one-on-one communication might give rise to fiduciary status. The challenges attendant to the breadth and ambiguity of the definition are best exemplified by the Department's recent recognition that even the most basic of conversations pertaining to the importance of adequate retirement savings may give rise to fiduciary status, thereby requiring the issuance of sub-regulatory guidance in an effort

[3] In our July 20, 2017 letter, we recommended at least a 12 month delay to the January 1, 2018 applicability date for compliance with all provisions of the prohibited transaction exemptions adopted or amended as part of the 2016 publication that are not currently applicable. In this regard, it is important that the Department act with urgency in an effort to limit the extent to which companies will unnecessarily have to invest resources in compliance efforts with rules that are likely to change.

[4] § 2510.3-21(a)(2)(ii) and (iii).

to further clarify.[5] Unfortunately, communications are so varied that no amount of guidance from the Department relating to the current definition will be sufficient to mitigate concerns about the unintended, inadvertent fiduciary status that could be attached to certain communications. Such ambiguity not only affects access to and understanding of products and services critical to a secure retirement, but will potentially deprive plan participants and beneficiaries, IRA owners, and plan fiduciaries of important information and guidance about their plans, IRAs, and investment options and strategies, at initial point-of-sale and from an ongoing service perspective.

The foregoing problems, in our view, are easily addressed by eliminating the "directed to" paragraph at (a)(2)(iii) of § 2510.3-21. We note that such a change is consistent with the Department's effort to update the fiduciary definition in 2010.[6]

Second, the definition, by conflating "marketing and sales" communications and "advice," presupposes that most consumers, as well as plan fiduciaries, are incapable of distinguishing certain marketing and sales communications from fiduciary-level, impartial advice. As a result, the definition, in its current form, effectively treats all sales and marketing activities with a plan participant, beneficiary, IRA owner, or plan fiduciary as a fiduciary act unless an exception applies even when it would be clear to a reasonable investor that impartial, fiduciary-level advice is not being provided.

We do not believe that regulation should predetermine and assume that consumers and fiduciaries for smaller plans generally cannot understand or distinguish between sales or marketing activities and impartial advice when disclosures can sufficiently inform them of the nature of the engagement.[7] We believe any continued concerns of the Department in this area could easily be addressed through a requirement for a simple, clear disclosure (to advice recipients who are either individuals or institutions) explaining that the activity is intended to be sales or marketing and not impartial, fiduciary-level advice. We note that such a disclosure-based approach is not inconsistent with the narrower "fiduciary" definition proposed by the Department in 2010.[8]

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[5] See Conflict of Interest FAQs dated May 2017 – Q&A12 and Conflict of Interest FAQs dated August 2017 – Q&As 2 and 3.

[6] See 75 Fed. Reg. 65277, at § 2510.3-21(c)(1)(ii)(D), October 22, 2010.

[7] We note that SEC Commissioner Michael S. Piwowar expressed similar concerns in his July 25, 2017 comment letter to the Department.

[8] See 75 Fed. Reg. 65277, at § 2510.3-21(c)(2). In this regard, we note that in 2010, the Department clearly recognized that when individuals on the other side of a sales transaction were believed to understand that the activity was sales or marketing, then the individual selling or marketing would not be treated as a fiduciary. In an exercise of caution, the Department did provide, in conjunction with the 2010 proposal, that, in the case of marketing specific platforms of investments, a simple disclosure informing the party that the person selling/marketing was "not undertaking to provide impartial advice" was adequate to avoid fiduciary status. It is difficult to rationalize the Department's significant change in positions from the 2010 proposal to the 2015 proposal on which the 2016 Rule is based.

Currently, the exception in the Rule for sales recommendations is limited to sales activities involving banks, insurance companies, registered investment advisers and broker-dealers, and other fiduciaries holding or managing at least $50 million; and then, only if certain conditions are satisfied. We believe these conditions have caused confusion, complexity and unnecessary paperwork without a commensurate benefit to investors. As noted above, we hope the Department will adjust the Rule in a manner that will remove the need for this exception in many circumstances. At a minimum, we strongly encourage the Department to remove the unnecessary conditions for the exception consistent with the preamble to the Rule in which the Department said: "The use of the term 'plan fiduciary' in the proposal was not intended to suggest that ordinary business activities among financial institutions and licensed financial professionals should become fiduciary investment advice relationships merely because the institution or professional was acting on behalf of an ERISA plan or IRA."[9]

Third, we are concerned that, with regard to the provided sales exception, platform provider exception and education exception, the "fiduciary" definition unnecessarily presupposes that IRA owners are not – and cannot be – sufficiently informed to make educated decisions about their investment choices. In this regard, it appears that the Department's analysis implicitly discounts the value of disclosures and the ability of IRA owners to freely rollover their accounts to competing providers when dissatisfied with performance or services. We encourage the Department, at a minimum, to amend the definition to extend these exceptions (at § 2510.3-21(b)(2)(i) and (ii), (c)(1), (b)(2)(iv)(C)(4) and (D)(6)) to IRA owners and thereby afford them the same product and educational opportunities afforded to plan fiduciaries, participants and beneficiaries under the definition. One exception that would be particularly appropriate and useful to extend fully to IRA owners is the education exception. The offering of asset allocation models that identify specific investment alternatives should be available to IRA owners, so long as the model identifies other alternatives available under the IRA that have similar risk and return characteristics and provides information about where more information about those alternatives may be obtained. This would reestablish the principles articulated in Interpretative Bulletin 96-1 regarding investment education that has served retirement savers – whether in ERISA plans or IRAs – well for two decades.

Fourth, the breadth of the definition continues to result in ambiguity as to whether or to what extent product manufacturers may be treated as a "fiduciary." We believe this ambiguity can be easily addressed by making clear in the definition itself that only those persons/entities directly providing investment recommendations to a plan, plan fiduciary with investment discretion, participant, beneficiary, or IRA owner will be treated as a fiduciary under the Rule. That is, there should be no ambiguity as to the non-fiduciary status of product manufacturers when they are not the ones in a direct sales

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[9] 81 Fed. Reg. 20982

relationship with retirement investors. In addition, there should be no ambiguity as to the non-fiduciary status of multiple affiliates of the same financial institution when financial professionals and wholesalers within the same financial institution interact.

Prohibited Transaction Exemptions

With respect to the exemption-related issues raised by the RFI, we focus first on the Department's best interest contract exemption ("BICE"). In general, we believe the utilization of the prohibited transaction exemption process is not the appropriate way to impose standards of conduct on fiduciaries not otherwise governed by ERISA. The past Administration's adoption of a conduct standard for the retail marketplace not only raises significant legal issues, but also represents a material departure from over 40 years of practice by the Department with regard to prohibited transaction exemptions.

In response to RFI Question 3, the BICE does not, in our view, appropriately balance the interest of consumers while ensuring their continued access to various products, services and advice. To the contrary, application of the BICE, in conjunction with the fiduciary definition and the other related prohibited transaction exemptions, will, in our view, continue to result in unintended consequences to consumers such as impeding access to products and services necessary for a secure retirement.

We are encouraged by public statements that the Department and the U.S. Securities and Exchange Commission ("SEC") are engaging in an enhanced coordination effort as it relates to establishment and enforcement of fiduciary standards. We believe this coordination effort should further extend to the Financial Industry Regulatory Authority ("FINRA"), the National Association of Insurance Commissioners, state insurance departments, and other regulatory bodies. We encourage the Department, working in close coordination with the SEC and other regulatory bodies, to replace the current BICE in favor of a streamlined, product agnostic, and disclosure-based prohibited transaction exemption, which covers the provision of investment advice. We further recommend that any standard of conduct and disclosure regime on which a prohibited transaction exemption is conditioned take into account and give deference to conduct standards and disclosure requirements applied under securities and state insurance laws, thereby mitigating the application of redundant, overlapping or conflicting regulatory standards. Such a coordinated approach to regulation, in our view, will better ensure consumer protections and regulatory oversight, while mitigating the present potential for confusion and unintended consequences.

In response to RFI Questions 5 and 6, we strongly urge the Department to eliminate the contract and warranty provisions of the BICE (Section II) as our significant efforts to comply with the Rule have underscored for us that these provisions are unnecessary, may lead to protracted and costly litigation, and may exacerbate the unintended consequences of the Rule. Accordingly, they should be eliminated in their entirety. In terms of the adequacy of compliance incentives in the absence of such provisions, we note that the financial industry is highly – and effectively – regulated, all to the benefit of consumers. Thus, we encourage the Department, in framing a new streamlined exemption, to give appropriate and deserved deference to SEC, FINRA, state securities and state insurance-based regulatory and enforcement regimes.[10] Moreover, noncompliance with the conditions of a prohibited transaction exemption carries the risk of onerous excise tax penalties that are due and owing to the federal government without regard to IRS collection efforts. In addition to any monetary risks, such noncompliance presents reputational risk that can be of far greater significance to an individual or company and is in our view a significant and highly effective deterrent to noncompliance.

In response to RFI Question 13, we strongly encourage the Department to meaningfully revise certain of the current disclosure requirements of the BICE. For example, we recommend elimination of the public website requirement. As noted by many other commenters, the envisioned website disclosure provides little in the way of information that is not otherwise readily available to retirement investors and simply serves as a tool to increase the amount of litigation associated with this Rule. Given such disclosures have no direct connection to the transaction for which relief is purportedly being given under the exemption, the public website disclosure requirement should be eliminated in its entirety.

As an alternative, we encourage the Department to consider a single set of clear and effective upfront disclosures focused on informing consumers of the costs and any potentially material conflicts of interest relevant to the provision of advice, in lieu of the disclosures currently required by the BICE. Importantly, however, any such disclosures should take into account - and not duplicate or add to - disclosures already required to be provided to consumers under federal securities law or state insurance laws, which are similarly designed to protect consumers and retirement investors. We believe a model disclosure statement or statements – developed in coordination with the other regulators, taking into account their vast experience in the retail marketplace - would benefit consumers and further compliance efforts on the part of the financial services industry generally.

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[10] SEC Commissioner Michael S. Piwowar made an effective case for this position in his July 25, 2017 comment letter to the Department when he indicated that: "Broker-dealers are required to deal fairly with their customers, pursuant to Commission and self-regulatory organization rules, such as those of the Financial Industry Regulatory Authority ("FINRA"). This duty of fair dealing includes the key customer protections of "suitability" and "best execution." And in stating that: "in the ongoing debate as to the creation of a uniform fiduciary duty for broker-dealers and investment advisers, it is sometimes asserted that a broker-dealer's duties have less "bite" than an investment adviser's obligations. This claim overlooks the robust regulatory scrutiny to which broker-dealers' selling activities are subject by both the Commission and FINRA."

In response to RFI Questions 7-9, we have serious concerns about regulation that effectively picks winners and losers through product-specific, simplified prohibited transaction exemptions. We are also concerned about the precedent such regulation would establish for future Administrations. We believe this is a slippery slope that should be avoided at all cost.

In addition, recognizing the resource and timing challenges attendant to the issuance of regulations and exemptions, we are concerned that promulgation of product-specific, simplified exemptions may chill innovation and creativity in the marketplace, discouraging or delaying provider offerings of newer, potentially more consumer friendly, products. We believe the appropriate Department response to the need for simplified exemptions should be a better, more appropriate "fiduciary" definition and the issuance of a prohibited transaction exemption that takes into account unintended consequences and is applicable generally to investment advice providers. The exemption should also take into account currently applicable disclosures required by a provider's regulator. We welcome the opportunity to work with the Department on the development of such an exemption.

In conclusion, we want to reiterate our support for the Administration's comprehensive review of the Rule and reinforce the importance of close and meaningful coordination between the Department, the SEC, FINRA, and state regulators on issues so very critical to ensuring that plan participants, beneficiaries, IRA owners, and plan fiduciaries have the products and services they need for a secure retirement.

We look forward to working with the Department on this and other issues impacting our retirement system and the retirement security of Americans. Should you have any questions concerning any of the matters discussed herein, please contact Robert J. Doyle, Vice President, External Affairs, at robert.j.doyle@prudential .com or 202.327.5244.

Sincerely yours,

Copies to:

Timothy D. Hauser, Deputy Assistant Secretary for Program Operations
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