

December 21, 2020

Paul R. Eckert

+1 202 663 6537 (t)

+1 202 663 6363 (f)

paul.eckert@wilmerhale.com

**BY ELECTRONIC DELIVERY**

Timothy B. Henseler, Esq.  
Chief, Office of Enforcement Liaison  
Division of Corporation Finance  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549

Re: In the Matter of Pruco Securities, LLC

Dear Mr. Henseler:

This letter is submitted on behalf of Prudential Financial, Inc. (“Prudential”), in connection with the settlement of the above-captioned administrative proceeding instituted by the U.S. Securities and Exchange Commission (the “Commission” or “SEC”) regarding Prudential’s indirect, wholly-owned subsidiary, Pruco Securities, LLC (“Pruco” or the “Respondent”) concerning Pruco’s wrap fee programs. The settlement resulted in the entry of an administrative and cease-and-desist order against the Respondent (the “Order”), which is described below.

Prudential is a public company and a “well-known seasoned issuer” (“WKSI”) as defined in Rule 405 of the Securities Act of 1933, as amended (“Securities Act”). Prudential and its direct and indirect subsidiaries provide insurance, investment management, and other financial products and services. Prudential accesses the capital markets frequently.

Pursuant to Securities Act Rule 405, Prudential hereby requests that the Commission or the Division of Corporation Finance, acting pursuant to delegated authority, determine that for good cause shown it is not necessary under the circumstances that Prudential be considered an “ineligible issuer” under Rule 405.

**BACKGROUND**

Respondent engaged in settlement discussions with the Staff of the Division of Enforcement, which resulted in the Commission issuing the Order. Solely for the purpose of settling this proceeding, the Respondent consented to the entry of the Order without admitting or denying the matters in it (except the Commission’s jurisdiction). The Order finds that the Respondent willfully violated Sections 206(2) and 206(4) of the Investment Advisers Act of 1940 (“Advisers Act”) and Rule 206(4)-7 thereunder. Specifically, the Order finds that Pruco breached its fiduciary duty to its advisory clients that participated in its wrap fee programs, where clients

pay an all-inclusive fee for asset management and trade execution. The Order describes that, at various times beginning in January 2014, Pruco breached its fiduciary duty to its clients by: (a) failing to conduct stated monitoring of client accounts to determine whether the wrap fee programs continued to be suitable for clients; (b) charging certain fees to some clients contrary to its disclosures; (c) recommending that clients purchase and hold certain mutual funds and mutual fund share classes that paid Pruco fees pursuant to Rule 12b-1 under the Investment Company Act of 1940 (“12b-1”) fees; (d) failing to disclose that it received revenue sharing payments on certain client investments pursuant to an agreement with its clearing firm (“Clearing Firm”), which also allowed Pruco to avoid paying certain transaction fees for its clients' purchases of mutual funds; (e) recommending bank sweep vehicles for which the Clearing Firm paid Pruco undisclosed revenue sharing; and (f) violating its duty to seek best execution for certain transactions by selecting or recommending mutual fund share classes when share classes of the same funds were available to the clients that presented a more favorable value or better performance.

The Order requires the Respondent to cease and desist from committing or causing any violations and any future violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-7 promulgated thereunder; censure the Respondent; and require the Respondent to pay disgorgement of \$12,665,989 and prejudgment interest of \$3,047,453 (subject to offsets for amounts already paid as of the issuance of the Order) and to pay a penalty of \$2,500,000. The Order also requires Respondent to comply with undertakings to: (a) review and correct as necessary all relevant disclosure documents concerning monitoring of client accounts, fee calculation, mutual fund share class selection, revenue sharing, transaction fees, and 12b-1 fees; (b) evaluate whether existing clients should be moved to a lower-cost or lower-revenue-sharing-paying share class and take steps move clients as necessary; (c) evaluate, and begin the process to update (if necessary), and review for the effectiveness of their implementation, Pruco’s policies and procedures so that they are reasonably designed to prevent violations of the Advisers Act in connection with disclosures regarding mutual fund share class selection, Revenue Sharing, and transaction fees in wrap accounts; and (d) notify affected investors (i.e., those former and current clients who were financially harmed by the practices discussed above (hereinafter, “affected investors”)) of the settlement terms of the Order by sending a copy of the Order to each affected investor via mail or email within 30 days; and (e) certify, in writing, compliance with the undertakings within 45 days the entry of the Order in a narrative supported by exhibits.

## DISCUSSION

In 2005, the Commission revised the registration, communications, and offering processes under the Securities Act.<sup>1</sup> As part of this offering reform, the Commission revised Securities Act Rule 405, creating a new category of issuer, the WKSI, and a new category of offering communication, the “free writing prospectus” (“FWP”). A WKSI is eligible for important benefits under the Commission’s rules, including the ability to register securities for offer and sale under an automatic shelf registration statement, which becomes effective upon filing and is also eligible

---

<sup>1</sup> See Securities Offering Reform, Securities Act Release No. 8591, Exchange Act Release No. 52,056, Investment Company Act Release No. 26,993, 70 Fed. Reg. 44,722, 44,790 (Aug. 3, 2005).

for the other benefits of the streamlined registration process, such as the ability to file automatically effective post-effective amendments to register additional securities and pay registration filing fees on a “pay as you go” basis. These rule changes have lessened the risk of regulatory delay in connection with capital formation without impacting investor protection. In addition, WKSIs are provided with greater flexibility in terms of communications, including the ability to use non-term sheet FWP in advance of filing a registration statement.

The Commission also created another category of issuer under Rule 405, the “ineligible issuer.” An ineligible issuer is an issuer that has, among other things, been found to have violated the antifraud provisions of the federal securities laws.<sup>2</sup> An ineligible issuer is excluded from the category of “well-known seasoned issuer” and is unable to avail itself of the benefits afforded to a WKSI.<sup>3</sup>

Securities Act Rule 405 authorizes the Commission to determine, “upon a showing of good cause, that it is not necessary under the circumstances that the issuer be considered an ineligible issuer.”<sup>4</sup> The Commission has delegated the function of granting or denying such applications to the Division of Corporation Finance.<sup>5</sup>

Prudential understands that the entry of the Order against its subsidiary, the Respondent, would make Prudential an ineligible issuer under Rule 405, absent a waiver from the Commission or the Division of Corporation Finance.

### **REASONS FOR GRANTING A WAIVER**

Consistent with the framework outlined in the Division of Corporation Finance’s Revised Statement on Well-Known Seasoned Issuer Waivers issued on April 24, 2014, Prudential respectfully requests that the Commission determine that it is not necessary for Prudential to be considered an ineligible issuer as a result of the entry of the Order. For the reasons described below, applying the ineligibility provisions to Prudential would be disproportionately and unduly severe.

#### **Nature of the Violation and Whether the Violation Casts Doubt on the Ability of the Issuer to Produce Reliable Disclosures to Investors.**

The violations found in the Order relate to breaches of fiduciary duty to certain advisory clients that participated in Pruco's wrap fee programs. The Order finds that Respondent failed to conduct stated monitoring of client accounts to determine whether the wrap fee programs

---

<sup>2</sup> See Securities Act Rule 405(1)(vi)(C).

<sup>3</sup> See Securities Act Rules 164(e), 405 and 433, 17 C.F.R. §§ 230.164(e), 230.405 and 230.433.

<sup>4</sup> Securities Act Rule 405, 17 C.F.R. § 230.405.

<sup>5</sup> 17 C.F.R. § 200.30-1(a)(10).

continued to be suitable for clients; incorrectly charged fees to some clients; received 12b-1 fees in connection with mutual funds and mutual fund share classes; failed to disclose in the Form ADV revenue sharing payments on certain client investments and money market fund share classes and avoidance of transaction fees; and violated its duty to seek best execution.

The Order does not pertain to, and does not describe, conduct that is related to Prudential's role as an issuer of securities or any of its filings with the Commission, as a WKSI or otherwise. The Order does not (i) question Prudential's disclosures in filings with the Commission as an issuer of securities, (ii) state that Prudential's disclosure controls and procedures as an issuer of securities were deficient, or (iii) describe fraud in connection with Prudential's offerings of its own securities. The Order describes conduct at Pruco, an indirect, wholly-owned subsidiary of Prudential, and does not implicate conduct at Prudential affiliates beyond Pruco or by the officers or employees of Prudential. No one who has been or will be responsible for, or had or will have any influence over, the disclosures of Prudential as an issuer of securities or in its filings with the Commission was involved in the conduct described in the Order.

#### The Conduct Described in the Order Does Not Involve Scienter-Based Fraud and Will Not Result in a Criminal Conviction.

An issuer's higher burden to show good cause when a matter involves the issuer's own disclosures and either a criminal conviction or scienter-based conduct,<sup>6</sup> does not apply here. The Order is civil in nature and does not find intentional or reckless conduct.

#### The Responsibility for and Duration of the Misconduct Described in the Order

The misconduct described in the Order involved Pruco's practices and disclosures as a registered investment adviser. The Order describes conduct going back to 2014 and ending in 2019. The Respondent terminated the conduct at issue and updated its Form ADV disclosures and policies and procedures to address the practices described in the Order.

The personnel responsible for the conduct that gave rise to the Order were associated with a separate line of business and do not overlap with personnel responsible for the preparation of Prudential's public disclosures and filings with the Commission as an issuer of securities.

#### Remedial Efforts

Pruco takes seriously its obligations under the federal securities laws and has implemented remedial measures and taken steps to address the disclosure and conflict-of-interest concerns addressed by the Order.

---

<sup>6</sup> See Division of Corporation Finance, Revised Statement on Well-Known Seasoned Issuer Waivers (Apr. 24, 2014), available at <https://www.sec.gov/divisions/corpfin/guidance/wksi-waivers-interp-031214.htm>.

#### A. Rebating 12b-1 Fees

Beginning in 2016, Pruco implemented a policy to rebate on a going forward basis all 12b-1 fees received in connection with mutual funds purchased and held in advisory accounts. Effective October 2016, Pruco began rebating clients' 12b-1 fees generated from these investments, and since then, as more fully described below, has exchanged client holdings into non-12b-1 share classes and continues to monitor for availability of lower-cost share classes on a periodic basis. Pruco performs multiple reviews and reconciliations over client account activity to validate that 12b-1 fees are appropriately rebated. These procedures include monthly reviews to confirm that 12b-1 fees have been accurately rebated to advisory accounts, as well as reviews to confirm that advisory accounts are properly configured during the account setup process so that 12b-1 fees would be properly rebated. After Pruco identified that a small amount of 12b-1 fees had not been properly rebated due to errors in the account setup process, Pruco corrected the errors in 2017 and put in place the controls described above to prevent recurrence.

#### B. Exchanging Share Classes

Beginning in July 2016, in connection with Pruco's efforts to begin rebating to clients all 12b-1 fees received based on investments in advisory accounts, Pruco began a substantial conversion of existing mutual fund investments into available lower-cost, non-12b-1 share classes of the same funds available on the clearing firm's platform, subject to eligibility restrictions. This was a significant project, which included converting share classes for over \$2.62 billion of client assets comprising 270 funds. The project involved over 280,000 positions in approximately 45,000 accounts, and was completed in June 2017.

Beginning in 2015 when onboarding new funds into its program, Pruco made requests to the fund companies for the lower cost institutional share classes if available. Pruco has also put in place a process to periodically monitor (at least annually) the availability of newly launched or restructured share classes that could benefit clients.

#### C. Revised Pruco Form ADV Brochures

Pruco has continued to enhance its Form ADV brochures during the relevant period. In March 2016, Pruco revised its summary of material changes to highlight existing disclosure regarding share classes of mutual funds, how Pruco is compensated, potential additional cost to clients and how to avoid such expense using less costly alternatives. Beginning in March 2017, Pruco enhanced its disclosure concerning revenue sharing and transaction fees. This disclosure was further augmented in March 2018, noting the economic incentive to include certain funds in the program, including "certain fees or revenue sharing [Pruco] may earn on such options, and whether certain Funds are available without the imposition of transaction fees, which reduces [Pruco's] costs to operate..."

#### D. Enhancements to Suitability and Monitoring Process and Related Remediation

Pruco formalized and enhanced its controls around the ongoing monitoring and review of advisory accounts through its implementation of the Enhanced Supervisory Standard Operating Procedure (“SOP”), which began in April 2015. Under a new Monitoring SOP, Pruco monitors advisory accounts for wrap fee suitability by utilizing a system that flags various issues for review, including inactivity, overconcentration in certain funds, and high diversification and risk variance. In July 2015, Pruco developed a supplemental process to address the suitability of new advisory accounts and the appropriateness of the advisory program selected by the client. The process looks at the source of funds for assets funding the client’s account to compare the client’s existing investment with the proposed investments and services.

Pruco retained a third-party compliance consultant in March 2016 to help assess the control environment for advisory accounts. In response to the consultant’s recommendations, Pruco improved its process by, among other things, adopting a quarterly monitoring process designed to review certain accounts against a number of different parameters including account activity, risk variance, position concentration, diversification and allocation to cash. Pruco also made enhancements to its supervisory process to improve the quarterly monitoring process to quickly distribute and review quarterly monitoring flags, create a centralized repository for information on flagged accounts, and improve the process by which Investment Adviser Representatives document responses to quarterly monitoring flags.

Beginning in June 2017 and concluding May 2018, Pruco completed four rounds of voluntary restitution of wrap fees to certain clients based on periods of inactivity and as to which, Pruco presumed that wrap fee accounts were not suitable.

#### E. Compliance Review

In May 2020, Pruco engaged a third-party compliance consultant to complete review and testing of compliance policies and procedures for its advisory program, with respect to suitability and monitoring, fee billing and share class selection. Pruco is in the process of implementing the consultant’s recommendations.

#### Prior Relief

Prudential has previously twice requested and received a waiver regarding ineligible issuer status. In June 2009, Prudential received a waiver in connection with a settlement between the Commission and American Skandia Investment Services, Inc., a subsidiary of Prudential.<sup>7</sup> The Division of Corporation Finance determined that, under the specific facts and circumstances, the settlement was reached in principle before December 1, 2005 (the effective date of the offering

---

<sup>7</sup> *In the Matter of Prudential Financial, Inc.* (June 9, 2009), <https://www.sec.gov/divisions/corpfin/cf-noaction/2009/prudentialfinancial060909-405.pdf>.

reforms in Rule 405), and, accordingly, determined Prudential would not be considered an ineligible issuer by reason of the entry of the order.

In September 2019, Prudential received a waiver in connection with a settlement between the Commission and AST Investment Services, Inc. (“AST”) and PGIM Investments LLC concerning their failure to disclose a conflict of interest between Prudential and 94 series funds offered through AST and The Prudential Series Fund (the “Funds”) relating to the recall of securities on loans; misleading disclosures concerning their securities lending program regarding the recall practice; and a failure to reimburse the Funds as promised for higher taxes in certain foreign jurisdictions resulting from the change in tax status of the Funds.<sup>8</sup>

#### Impact on Issuer if Request is Denied

The Division’s Revised Statement provides that it will “assess whether the loss of WKSI status would be a disproportionate hardship in light of the nature of the issuer’s conduct.” We respectfully submit that applying ineligible issuer status to Prudential, the Respondent’s ultimate parent company, would be unduly and disproportionately severe on Prudential, particularly in light of the remedial efforts described above.

Prudential is a leading financial services organization and premier global investment manager with approximately \$1.605 trillion of assets under management as of June 30, 2020. Through its subsidiaries and affiliates, it provides a diverse range of financial products and services to customers, including life insurance, annuities, retirement-related products and services, mutual funds, and investment management throughout the United States and in many other countries. Prudential offers these products and services to individual and institutional customers through proprietary and third-party distribution networks throughout the world.

Prudential is a regular issuer of securities that are registered with the Commission and offered and sold off its current and past automatically effective Form S-3ASR registration statements (“WKSI shelf”). The WKSI shelf process, with its provision for automatic effectiveness, allows an issuer to register quickly new securities that would customarily have been registered on a typical shelf. The WKSI shelf rules also allow access to the widest possible global investor base, as they permit the use of FWPs to provide tailored disclosure targeted at different categories of investors in different markets.

Prudential has frequently used its WKSI shelf for quick and streamlined access to the capital markets, which is an important source of funding for Prudential to generate and maintain sufficient liquidity to meet its payment obligations and long-term capital to support the operations of Prudential’s businesses, fund business growth, and provide additional loss absorbing capacity to withstand adverse circumstances. Prudential also issues a wide variety of securities that are registered under the WKSI shelf, including an institutional medium-term notes program with an

---

<sup>8</sup> *In the Matter of Prudential Financial, Inc.* (Sept. 16, 2009), <https://www.sec.gov/divisions/corpfin/cf-noaction/2019/prudential-financial-091619-405.pdf>; <https://www.sec.gov/rules/other/2019/33-10685.pdf>

authorized issuance capacity of \$20.0 billion, a retail notes program with an authorized issuance capacity of \$5.0 billion, and junior subordinated notes that qualify for partial equity treatment from the ratings agencies and are critical to Prudential's capital structure. Since January 2014, Prudential has issued and sold approximately \$13.7 billion off the WKSI shelf. These figures demonstrate the importance of the WKSI shelf to Prudential in meeting its capital, funding, and business requirements.

The flexibility afforded to Prudential by WKSI status is particularly important in light of market conditions and uncertainties that are significantly transforming the landscape for financial institutions like Prudential. During the first half of 2020, the outbreak of COVID-19 has resulted in stress and disruption in the global economy and financial markets, and has adversely impacted, and may continue to adversely impact, the results of operations, financial condition, and cash flows of financial institutions, including Prudential. Maintaining efficient access to the capital markets is particularly important to Prudential during this period of uncertainty. Prudential most recently accessed the capital markets using its WKSI shelf to issue \$1.5 billion of medium-term notes in March 2020 and \$1.3 billion of junior subordinated notes in August 2020. These offerings were part of several important actions taken by Prudential since the start of the COVID-19 pandemic to proactively refinance maturing debt obligations and augment its overall financial flexibility.

Prudential again may require quick access to the capital markets in the short or medium term. As a large, global financial services organization and investment manager, Prudential's ability to respond rapidly to market conditions in order to raise capital on acceptable terms is critical. Although a standard shelf registration statement would allow Prudential to respond to market conditions in most circumstances, it is an imperfect substitute for automatic shelf registration. For example, the flexibility of a WKSI shelf is important to Prudential's future liquidity- and capital-raising activities because it allows Prudential to offer new securities not covered by a registration statement and register an indeterminate amount of securities, as it currently does through the WKSI shelf. Even if Prudential were to register more than it reasonably anticipates issuing as a buffer, conditions could arise where Prudential would need to issue more than would reasonably be included on a non-WKSI shelf. As a result, loss of WKSI status would harm Prudential by leaving it without an important means of generating and maintaining sufficient liquidity and accessing capital.

Effective and prudent liquidity and capital management are priorities across the organization, and Prudential's WKSI status and continued availability of its WKSI shelf are key components to executing those priorities. The primary uses of liquidity at Prudential include servicing debt, making acquisitions, paying declared shareholder dividends, executing share repurchases, and making capital contributions and loans to subsidiaries which may help those subsidiaries meet their obligations to customers. Should Prudential experience unforeseen strains on its liquidity, Prudential may need to increase the use of alternative sources of liquidity, such as accessing the capital markets. For example, Prudential may find it necessary to support further its liquidity and capital position by taking additional financing actions, such as executing additional offerings of senior or subordinated debt securities or preferred or common equity securities into the capital markets through use of its WKSI shelf. Moreover, while Prudential's significant



insurance subsidiaries currently maintain capital levels consistent with their ratings targets, market conditions could negatively impact the statutory capital of its insurance companies and constrain its overall capital flexibility. Prudential's businesses also are subject to comprehensive regulation and supervision by domestic and international regulators. Global, federal, and state regulations regarding capital standards for insurance companies and their entire group of companies continue to evolve and may include further refinements to the eligibility criteria of applicable securities for meeting capital, leverage, and liquidity requirements, the outlines and impacts of which are not fully known. Continued adverse market conditions could require Prudential to take additional management actions for the insurance subsidiaries to maintain capital consistent with their ratings objectives, which may include redeploying financial resources from internal sources, or, if markets continue to decline, using available external sources of capital or seeking additional sources. Moreover, new regulatory capital standards applicable to insurance companies and/or their affiliated group of companies could result in Prudential seeking to issue unique forms of securities into the capital markets to fund efficiently these new requirements, a process that access to the WKSI shelf and the use of various forms of FWPs would more easily allow.

\* \* \*

In light of these considerations, Prudential believes subjecting it to ineligible issuer status is not necessary under the circumstances, either in the public interest or for the protection of investors, and good cause exists to determine that Prudential should not be considered an ineligible issuer under Rule 405 as a result of the entry of the Order. We respectfully request the Commission or the Division of Corporation Finance, pursuant to delegated authority, to make that determination.

Thank you for your attention to this matter. Please let me know if any additional information is required.

Sincerely,



Paul R. Eckert