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September 12, 2019

**BY ELECTRONIC MAIL**

Mr. Tim Henseler  
Office 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 AST Investment Services, Inc. and PGIM Investments LLC

Dear Mr. Henseler:

This letter is submitted on behalf of Prudential Financial, Inc. (“Prudential”), in connection with the forthcoming settlement of the above-captioned administrative proceeding by the Securities and Exchange Commission (the “Commission” or “SEC”), which is expected to resolve claims of the Commission against AST Investment Services, Inc. (“AST”) and PGIM Investments LLC (“PGIM”, and together with AST, the “Respondents”) concerning the recall of securities on loan in certain insurance funds. The settlement is expected to result in the entry of an administrative and cease-and-desist order against the Respondents (the “Order”), which is described below.

Pursuant to Rule 405 promulgated under the Securities Act of 1933 (the “Securities Act”), 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. Prudential requests that the Commission consider this waiver request simultaneously with the offer of settlement regarding the underlying enforcement recommendation. Prudential requests that this determination be effective upon the entry of the Order.

**BACKGROUND**

The Respondents expect to enter into a settlement with the Commission in September of 2019, which is expected to result in the Commission issuing the Order. Solely for the purpose of settling these proceedings, the Respondents will consent to the entry of the Order without admitting or denying the matters in it (except the Commission’s jurisdiction). The Order will find that the Respondents willfully violated Sections 206(2) and 206(4) of the Investment

Mr. Tim Henseler  
September 12, 2019  
Page 2

Advisers Act of 1940 (“Advisers Act”) and Rules 206(4)-7 and 206(4)-8 thereunder. Specifically, the Order will find that, the Respondents failed to disclose a conflict of interest between Prudential and 94 series funds offered through AST and The Prudential Series Fund (“Funds”) resulting from the recall practice to the Funds’ board of trustees, or to the variable annuity and variable life insurance contract holders who were the beneficial owners of the Funds’ shares, rendering certain disclosures the Respondents made concerning the securities lending program materially misleading. The recall practice resulted in lost revenue to the Funds and was motivated by a desire to increase the tax benefit to Prudential. In addition, the Order will find that the Respondents failed to reimburse the Funds as promised for higher taxes in certain foreign jurisdictions. The Respondents investigated the issues and self-reported them to Prudential’s board and the SEC.

The Order will require the Respondents to cease and desist from committing or causing any violations and any future violations of Advisers Act Sections 206(2) and 206(4) and Rules 206(4)-7 and 206(4)-8; censure the Respondents; and require the Respondents to pay disgorgement of \$27,632,560 and a civil monetary penalty of \$5 million.

## 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 “well-known seasoned issuer” (or “WKSI”), and a new category of offering communication, the “free writing prospectus.” A well-known seasoned issuer is eligible for important benefits under the Commission’s rules that have changed the way corporate finance transactions for larger issuers are planned and structured, including the ability to “file-and-go” (*i.e.*, eligibility for automatically effective shelf registration statements) and “pay-as-you-go” (*i.e.*, the ability to pay filing fees as the issuer sells securities off the shelf). These rule changes have lessened the risk of regulatory delay in connection with capital formation without impacting the protection to investors. In addition, well-known seasoned issuers are provided with greater flexibility in terms of communications, including the ability to use free writing prospectuses 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 who 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

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<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).

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

Mr. Tim Henseler  
September 12, 2019  
Page 3

from the category of “well-known seasoned issuer” and is unable to avail itself of the benefits afforded to a “well-known seasoned issuer.”<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 subsidiaries, the Respondents, 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 Violation and Whether It Casts Doubt on Ability of Issuer to Produce Reliable Disclosures to Public

The nature of the violations found in the Order relates to the Respondents’ failure to disclose a conflict of interest between Prudential and the Funds relating to the recall of securities on loan; 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. The disclosures at issue in the Order impacted the Funds’ prospectus and financial statements. The financial statements did not reflect tax differentials for some dividends and such differential totaled only about \$11.5 million for the foreign tax dividends and about \$74 million for the recall practice over 10 years. The conduct that will be described in the Order does not relate to Prudential’s role as an issuer of securities or any of its related filings with the Commission or otherwise involve alleged fraud in connection with Prudential’s offerings of its own securities. Rather, the alleged activity at issue related to the Respondents’ securities lending program.

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

Mr. Tim Henseler  
September 12, 2019  
Page 4

#### Order is not Criminal in Nature

As noted above, the Order will find that the Respondents failed to disclose a conflict of interest between Prudential and the Funds and the Respondents made misleading disclosures concerning their securities lending program. In addition, the Order will find that the Respondents failed to reimburse the Funds as promised for higher taxes in certain foreign jurisdictions. The conduct that will be described in the Order is not criminal in nature, nor does it involve any violations of the scienter-based anti-fraud provisions of the federal securities laws. None of the individuals involved in the conduct described in the Order have been or will be responsible for the disclosures of Prudential as an issuer of securities or in its filings with the Commission.

The Respondents' violative conduct related to their securities lending program and a failure to reimburse the Funds as promised for higher taxes in certain foreign jurisdictions. Although the Order finds that the Respondents failed to disclose to contract holders or the Board the recall practice or the conflict of interest in the recall of Fund securities, Prudential believes that the conduct as described above does not call into question the reliability of Prudential's current and future disclosures as an issuer of securities; none of the conduct is related to the preparation of Prudential's disclosures as an issuer of securities or its filings with the Commission. The violations are the result of conduct by the Respondents and certain of Respondents' employees. Neither Prudential's senior management nor the members of its Board of Directors were aware of the violations described in the Order or ignored any warning signs or "red flags" regarding those violations. The Order will 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 securities offerings by Prudential.

#### Duration of Conduct

Further, while the conduct at issue in the Order relating to the securities lending business began in 2005, it is important to note that, immediately upon becoming aware of the issue, Prudential conducted an internal investigation and self-reported the information to the SEC and other regulators. In addition, the Respondents also self-reported the foreign tax withholding tax issue in March 2018 shortly after it was discovered and conducted a separate internal investigation. Accordingly, Prudential believes that designation as an ineligible issuer is not necessary for the public interest or the protection of existing and potential investors in Prudential's securities.

Mr. Tim Henseler  
September 12, 2019  
Page 5

### Cooperation and Remedial Efforts

Prudential takes seriously its obligations under the securities laws and has cooperated extensively with the investigation into this matter by the Division of Enforcement. In February 2016, the Respondents and Prudential self-reported the conflict of interest related to their securities lending practices to the Commission staff. The Respondents also self-reported the foreign tax withholding issue shortly after it was discovered and conducted a separate internal investigation.

#### A. *Prudential Has Made Complete Restitution to the Funds*

In June 2016, Prudential voluntarily paid approximately \$71.9 million to the Funds. This amount placed the Funds in the position they would have been in had there been no recall of Fund securities prior to a dividend record date. The amounts included lost securities lending revenue and also provided fund investors with the performance they would have earned if that income had been reinvested in the Funds between 2005 and 2015. In addition, the amounts included the differences in foreign taxation based on the Funds' tax status.

Further, between 2018 and 2019, Prudential voluntarily paid approximately \$83.7 million to the Funds as reimbursement for the foreign tax withholding matter. This amount reimbursed the Funds for certain foreign tax withholding detriments resulting from the Funds' conversion to tax partnerships in 2006 which benefited Prudential.

#### B. *The Funds Have Augmented Their Securities Lending Policies and Procedures*

Prudential is no longer the securities lending vendor since the Funds have replaced Prudential with other vendors. Prudential ceased the recall of securities on loan for its insurance funds. The fund boards retained a new, unaffiliated securities lending agent which determines whether to lend securities.

The Funds have enhanced their securities lending policies and procedures since learning of the recall practice. Under the current policy, the Funds retain the right to recall a security to vote a proxy or to cover the sale of the security. The policy does not permit, however, the recall of securities on loan prior to the record date for a particular dividend or distribution. Additionally, Fund Administration procedures have been augmented to limit the personnel authorized to provide instructions to the securities lending agent.

Further, and in connection with foreign withholding taxes, Prudential has developed new procedures to address rate or timing differences on a going forward basis (Tax Reclaim Procedures). Under the Tax Reclaim Procedures, Prudential will make a payment to a Fund the

Mr. Tim Henseler  
September 12, 2019  
Page 6

business day following the pay-date of any in-scope event for which there are rate or timing differences in foreign withholding taxes between a regulated investment company and a partnership. Such payments are designed to be made to the Funds as promptly as possible to ensure that the Funds are not adversely affected due to their partnership tax status. PGIM Compliance, PGIM Mutual Fund Administration, and other Prudential business units worked with a third-party consulting firm, Ernst & Young LLP, and the Funds' custodian and fund accounting agent, The Bank of New York Mellon, to develop and implement the new process and to establish monitoring and testing of the Tax Reclaim Procedures. In addition, Prudential established a governance council to oversee the processes and controls relating to the Tax Reclaim Procedures and to address other matters arising from the Funds' status as tax partnerships.

C. *Prudential Initiated a Review of Its Conflicts of Interest Procedures and Created Customized Training Programs*

The identification of the conflict of interest in the recall of Fund securities prompted PGIM and AST, with guidance from the Law Department, to conduct a comprehensive review of its policies and procedures to identify and address potential gaps in controls with respect to conflicts of interest. PGIM and AST have enhanced their policies and procedures to address various conflicts that may arise between fund shareholders and PGIM and AST, and between fund shareholders and employees. Further, Prudential Compliance has designed customized conflicts of interest training programs, with scenarios tailored to each Prudential asset management business unit. Prudential is in the process of implementing customized conflict of interest training and testing for all asset management employees worldwide.

Regarding the foreign tax withholding matter, PGIM Compliance conducted specialized training sessions with PGIM Mutual Fund Administration to review the new Tax Reclaim Procedures in addition to reviewing potential conflicts of interest associated with the proposed new process. Those trainings took place prior to the launch of the new process in March 2019 and November 2018, respectively. In early 2019, PGIM Mutual Fund Administration also received training provided by the Funds' custodian bank on workflows developed to support the new Tax Reclaim Procedures. Further, in January 2019, PGIM Mutual Fund Administration hired an additional staff member dedicated to the new process.

D. *Prudential Developed Enhanced Escalation Training for Law, Compliance, and Business Ethics and External Affairs Associates*

In 2016, Prudential launched specialized training on the identification and escalation of conflicts of interest for Law, Compliance and Business Ethics associates. The training emphasized Prudential's "open-door culture" and directs individuals to raise conflicts with his or

Mr. Tim Henseler  
September 12, 2019  
Page 7

her manager or supervisor, who should escalate as appropriate, and emphasizes the importance of escalating issues across business units and functions as well as up the management chain of command.

#### Prior Relief

Prudential has previously requested and received a waiver regarding ineligible issuer status in June 2009.<sup>6</sup> The prior waiver was in connection with a 2009 settlement between the Commission and American Skandia Investment Services, Inc, a subsidiary of Prudential. The Division of Corporation Finance determined that under the specific facts and circumstances that the settlement was reached in principal prior to December 1, 2005 (the effective date of the offering reforms in Rule 405) and, accordingly, granted relief.

#### Impact on Issuer

The Order will direct the Respondents to pay a significant penalty in addition to a substantial disgorgement payment. As noted above, the conduct that will be addressed in the Order ceased before it was self-reported. Applying ineligible issuer status to Prudential is unnecessary to achieving the purpose of the Order. It would also be unduly and disproportionately severe, particularly in light of Prudential's cooperation and remedial efforts described above, and would impose a significant burden on Prudential.

The WKSIF shelf (as defined below) 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 WKSIF shelf rules also allow access to the widest possible global investor base, as they permit the use of free writing prospectuses to provide tailored disclosure targeted at different categories of investors in different markets. Prudential is a frequent issuer of securities that are registered with the Commission and offered and sold under its current Form S-3 registration statement (the "WKSIF shelf"), which provides automatic effectiveness and an important means of accessing capital, additional loss absorbing capacity, and funding for Prudential's global operations.

Prudential issues a variety of securities that are registered under the WKSIF shelf, including under an institutional medium-term notes program with an authorized issuance capacity of \$20.0 billion and an InterNotes® program with an authorized issuance capacity of \$5.0 billion. Prudential has also issued junior subordinated notes off its WKSIF shelf, which qualify for partial equity treatment from the ratings agencies and are critical to Prudential's capital structure. Since January of 2014, the dollar amount of all securities issued by Prudential

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<sup>6</sup> *In the Matter Prudential Financial, Inc.* (File No. C-03827-A) (June 9, 2009), <https://www.sec.gov/divisions/corpfin/cf-noaction/2009/prudentialfinancial060909-405.pdf>.

Mr. Tim Henseler  
September 12, 2019  
Page 8

off the WKSI shelf is approximately \$9.4 billion. These figures demonstrate the importance of the WKSI shelf to Prudential in meeting its capital, funding, and business requirements.

As an ineligible issuer, Prudential would lose the flexibility to (i) offer additional securities of the classes covered by a registration statement without filing a new registration statement; (ii) register additional classes of securities not covered by the registration statement by filing a post-effective amendment, which becomes immediately effective; (iii) omit certain information from the prospectus; (iv) take advantage of the pay-as-you-go fees; or (v) qualify a new indenture under the Trust Indenture Act of 1939, as amended, should the need arise, without filing or having the Commission declare effective a new registration statement. Subjecting Prudential to a review period would limit flexibility and ability to access markets when conditions are most advantageous. Increased uncertainty and costs would result from Prudential's loss of WKSI status.

In addition, as an ineligible issuer, Prudential would be unable to use free writing prospectuses ("FWP") other than ones that contain only a description of the terms of the securities in the offering or the offering itself. While historically Prudential has utilized only such term sheet FWPs, a restriction on Prudential's ability to use such materials would significantly curtail important channels of communication to investors, and reduce flexibility in responding to market practices and demands on similarly situated issuers by placing Prudential at a competitive disadvantage.

The adverse market and issuer impact of the potential loss of flexibility and delay in access to the market with respect to new types of securities is particularly important to Prudential in light of current regulatory and market conditions and uncertainties that are significantly transforming the landscape for financial institutions like Prudential. Global, federal and state regulations regarding capital standards for insurance 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.

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 Order that will be entered in this matter. We respectfully request the Commission or the Division of Corporation Finance, pursuant to delegated authority, to make that determination.

WILMERHALE

Mr. Tim Henseler  
September 12, 2019  
Page 9

Please contact me at the above-listed telephone number if you should have any questions regarding this request.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Eckert", with a long horizontal flourish extending to the right.

Paul R. Eckert