

of the exemption application file (Exemption Application No. D-10997) that the Department is maintaining in this case. The complete application file, as well as all supplemental submissions received by the Department are made available for public inspection in the Public Disclosure Room of the Pension and Welfare Benefits Administration, Room N-1513, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

Accordingly, after giving full consideration to the entire record, the Department has decided to grant the exemption to modify PTE 97-08.

#### General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which require, among other things, a fiduciary to discharge his or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) The exemption will not extend to transactions prohibited under section 406(b) of the Act and section 4975(c)(1)(E) or (F) of the Code;

(3) In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990), and based upon the entire record, the Department finds that the exemption is administratively feasible, in the interest of plans and of their participants and beneficiaries and protective of the rights of participants and beneficiaries of such plans;

(4) The exemption will be supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(5) This exemption is subject to the express condition that the Summary of Facts and Representations set forth in the Notice of Proposed Exemption relating to PTE 97-08, as amended by the Notice of Proposed Exemption relating to this exemption, accurately describes, where relevant, the material terms of the transactions to be consummated pursuant to this exemption.

#### Exemption

Based on the facts and representations set forth in the application, under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990), the Department hereby amends PTE 97-08 to include in Section I an additional transaction (D), as set forth below:

##### Section I. Transactions

D. Effective August 25, 1995, the restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply, to a guaranty given to a Plan by MSDW&Co or any U.S. affiliate of MSDW&Co, provided that the guaranty when given:

(a) Is in connection with one of the transactions, described in section I (A), (B), or (C) of PTE 97-08, for which the specific conditions for such transaction and all of the general conditions, as set forth in PTE 97-08 have been satisfied;

(b) Is lawful under the applicable securities laws;

(c) Is provided at no separate cost to the Plan; and

(d) Is not a prohibited transaction under section 503(b) of the Code.

The availability of this exemption is subject to the express condition that the material facts and representations contained in the application for exemption are true and complete and accurately describe all material terms of the transactions. In the case of continuing transactions, if any of the material facts or representations described in the application change, the exemption will cease to apply as of the date of such change. In the event of any such change, an application for a new exemption must be made to the Department.

For a more complete statement of the facts and representations supporting the Department's decision to grant PTE 97-08, refer to the Notice of Proposed Exemption (61 FR 58237, November 13, 1996) and the Final Exemption (62 FR 4811, January 31, 1997). For a more

complete statement of the facts and representations supporting the Department's decision to grant this amendment to PTE 97-08, refer to the Notice of Proposed Exemption to Modify PTE 97-08 (66 FR 46843, September 7, 2001).

Signed at Washington, DC, this 15th day of January, 2002.

**Ivan L. Strasfeld,**

*Director of Exemption Determinations,  
Pension and Welfare Benefits Administration,  
Department of Labor.*

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#### DEPARTMENT OF LABOR

##### Pension and Welfare Benefits Administration

[Application No. D-11035, et al.]

##### Proposed Exemptions; Smart Chevrolet Co. Employees' Profit Sharing Retirement Plan et al.

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Notice of proposed exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

##### Written Comments and Hearing Requests

All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this **Federal Register** Notice. Comments and requests for a hearing should state: (1) The name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

**ADDRESSES:** All written comments and requests for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration (PWBA), Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Attention: Application No. \_\_\_\_\_, stated

in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to PWBA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: "moffittb@pwba.dol.gov", or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW., Washington, DC 20210.

#### Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the **Federal Register**. Such notice shall include a copy of the notice of proposed exemption as published in the **Federal Register** and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

**SUPPLEMENTARY INFORMATION:** The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

#### Smart Chevrolet Co. Employees' Profit Sharing Retirement Plan (the Plan) Located in Pine Bluff, Arkansas

[Application No. D-11035]

##### Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55

FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of sections 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to: (1) The proposed secured loans (the Loans) by the Plan to Motors Finance Company (Motors), a party in interest with respect to the Plan, and (2) the guaranty of such Loans (the Guaranty) by the individual partners of Motors; provided that the following conditions are met: (a) The terms and conditions of the Loans are at least as favorable as those which the Plan could have received in similar transactions with an unrelated third party; (b) an independent fiduciary negotiates, reviews, approves, and monitors the Loans and the Guaranty under the terms and conditions, as set forth in paragraph #6 below; and (c) the balance of all Loans will at no time exceed 15% of the assets of the Plan.<sup>1</sup>

##### Temporary Nature of Exemption

The proposed exemption is temporary and, if granted, will expire September 16, 2007. However, the exemption will extend until the maturity of any of the 90 day Loans made prior to September 16, 2007.

##### Summary of Facts and Representations

1. The Plan is a defined contribution profit sharing plan which, as of December 31, 2000, had assets totaling \$3,261,663. As of the same date, the Plan had forty-one (41) participants. Richard L. Smart (Mr. Smart), S. Ray West, Jr. (Mr. West), Lee Smart (Lee) and Roger Smart (Roger) are participants in and are the Advisory Committee of the Plan. Smart Chevrolet Company (the Employer) is the sponsor of the Plan. The Employer sells new and used automobiles in the Pine Bluff, Arkansas area. As of December 31, 2000, the Employer had a net worth of \$5,260,199. Mr. Smart is the president of and a shareholder in the Employer.

2. Motors is engaged in financing the purchase of new and used automobiles sold by the Employer to its customers. The net worth of Motors, as of December 31, 2000, was \$300,000. Certain of the principal owners of the Employer are also partners in Motors. Mr. Smart is a five percent (5%) managing partner in Motors. Meredith S. Maxwell, Felix Smart, Lee, Roger and Mr. West each own a fifteen percent (15%) partnership interest in Motors. The collective net

worth of the partners of Motors, as of December 31, 2000, was \$11,700,000. The net worth of the partners of Motors includes their respective interests in Motors, in the Employer, and in certain notes payable to its partners by Motors.

3. The current trustee of the Plan is Pine Bluff National Trust Department (the Trustee), successor in interest to Boatmen's Trust Company of Arkansas (Boatmen's), the trustee at the time Prohibited Transaction Exemption (PTE) 97-52 (see rep. 4, below) was granted. Pine Bluff National Bank (PBNB) is the parent corporation of the Trustee, and participates in a line of credit to supply Motors with operating funds of from \$100,000 to \$200,000 daily.

4. On July 8, 1985, the Department granted an exemption (PTE 85-121, 50 FR 27863) which permitted for a period of seven (7) years beginning July 8, 1985, certain Loans to Motors by two employee benefit plans (the Plans) then sponsored by the Employer, and to the guaranty of such Loans by the Employer and the individual partners of Motors. Subsequent to the grant of PTE 85-121, the Smart Chevrolet Employees Retirement Plan, one of the Plans which participated in the exemption for PTE 85-121, was merged into the Plan.<sup>2</sup> On June 17, 1992, the Department granted an exemption (PTE 92-43, 57 FR 27073) which permitted, for a period of five (5) years, certain Loans by the Plan to Motors. On September 16, 1997, the Department granted an exemption (PTE 97-52, 62 FR 48673) extending PTE 92-43 for a period of five years, thus permitting certain Loans by the Plan to Motors for an additional five-year period.

It is represented that under the three prior exemptions Motors has made all payments on the Loans in a timely manner and has never defaulted on any of the Loans made by the Plans. As a result of such Loans made pursuant to PTE 97-52, the Plan received an interest rate of between 6.50% to 8.00%, depending on the Federal Discount Rate in effect at the time such Loans were executed. Further, though the principal balance of these Loans has varied from time to time, the terms and conditions of each of the Loans complied with the requirements set forth in the exemptions. The aggregate fair market value of these Loans by the Plan to Motors, as of the most recent annual report, was \$486,224, which represented 14.91% of the fair market value of the total assets of the Plan. The applicant,

<sup>1</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

<sup>2</sup> All references in this Summary of Fact and Representations to the Plan will, if applicable, include both Plans prior to the merger unless the context clearly dictates otherwise.

herein, is requesting another exemption which will permit the continuation of such Loans for a period of five (5) years beginning on the date of the grant of this proposed exemption. The applicant has represented that with respect to Loans made pursuant to the exemption proposed herein, the Loans will not exceed 15% of aggregate Plan assets.

5. Jess P. Walt (Mr. Walt), who served as the Plan's independent fiduciary for purposes of the transactions exempted by PTE 97-52, has agreed to continue to serve as the independent fiduciary. Mr. Walt, who is a banker, represents that he is independent in that none of the partners of Motors, or the stockholders, officers, or directors of the Employer are officers or directors of the bank where Mr. Walt is employed, the First National Bank of Altheimer, Arkansas (the Bank). In addition, Mr. Walt represents that none of these persons are stockholders of the Bank, except Felix Smart, who owns 35 of the 7,500 outstanding shares, which represent a .47% ownership percentage of the Bank. It is represented that the partners of Motors, the Employer and its officers, directors, and shareholders do not have any loans or accounts outstanding at the Bank. Further, the Bank represents that it does not participate in the line of credit extended to Motors by PBNB.

Mr. Walt represents that he is qualified to act on behalf of the Plan in that he, as a Bank officer, has been involved for many years in making automobile installment loans and evaluating credit and collateral considerations related to such loans. Mr. Walt also represents that he is knowledgeable in selecting appropriate rates of return on short term investments and will be continuously aware of the fluctuations in short term interest rates and the alternative low risk short term investments that would be available to the Plan.

6. Mr. Walt will accept fiduciary responsibility with respect to the proposed transactions. In this regard, Mr. Walt will be responsible for determining whether it is advisable for the Plan to enter into the Loans and the Guaranty which are the subject of this proposed exemption and to continue to participate in such transactions, taking into account the rate of return of such investment and the liquidity and diversification of the Plan.

It is represented that Mr. Walt will approve Loans in an amount not to exceed fifteen percent (15%) of the assets of the Plan, provided that all of the terms and conditions described

herein are met.<sup>3</sup> All Loans will have a maturity of ninety (90) days and will bear interest at a rate which is two percentage points above the Federal Discount Rate. Mr. Walt represents that such interest rate reflects the prevailing fair market interest rate on comparable short-term investments. Mr. Walt represents that he will receive copies of all the promissory notes evidencing the Loans in order to insure that the interest rate is two percent (2%) above the Federal Discount Rate. If at any time a rate of two percentage points above the Federal Discount Rate is not reflective of the prevailing fair market rate of return on comparable ninety (90) day investments, Mr. Walt indicates that the Loans should be liquidated at the next maturity date, or the yield on such Loans be increased to the then prevailing fair market rate.

The Loans will be secured by all of the installment sale contracts (the Contracts) of Motors. As of December 31, 2000, Motors had 1,098 outstanding Contracts totaling \$10,530,000, with an average balance of \$9,590 per Contract. Mr. Walt has represented that he will examine the security agreement and financing statements with regard to the Contracts and will ascertain that the Plan's security interest in all of the Contracts is properly executed, and that such security interest is perfected by properly filed financing statements in conformity with the applicable Uniform Commercial Code (UCC) provisions, as adopted in Arkansas. It is represented that Mr. Walt, through a combination of monthly reports from PBNB and monthly Certification of Compliance Statements signed by Mr. Smart, will insure that at all times the aggregate face value of the Contracts equals at least 200% of the total outstanding balance of the Loans. It is further represented that if at the end of any month the report from the Trustee indicates that the aggregate face value of the Contracts does not equal at least 200% of the total outstanding balance of the Loans, Mr. Walt will direct Motors to pay the Plan an amount sufficient to bring the Loans into compliance with the 200% collateral requirement.

Mr. Walt, on behalf of the Plan, has accepted the commitment of the Employer and Motors that the Contracts will conform to the following loan policy guidelines: (a) A complete credit history will be performed for each

<sup>3</sup> PTE's 85-121 and 92-43 permitted the Plan to invest up to 25% of its assets in these Loans. PTE 97-52 limited the Plan's investment in these Loans to no more than 15% of the Plan's assets. The applicant has represented that no more than 15% of the Plan's assets will be invested in the Loans under the exemption proposed herein.

customer; (b) a customer's credit history will be analyzed together with the customer's equity and the terms of the Loan; (c) depending on the use of the vehicle, a customer equity of from 10% to 30% will be required; (d) with an extension of six months available in circumstances of minimal vehicle use, the maximum term of any of the Contracts will be 60 months on new and current year used vehicles, 54 months, 42 months, 42 months, 36 months, and 24 months, respectively, on one, two, three, four, and five-year old vehicles; (e) prior to closing on any Contracts, a written certificate of insurance from an insurance agent will be required showing that the automobile is covered for physical damage with no more than a \$250 deductible; (f) such insurance coverage includes fire, theft, and other perils and shows Motors as loss payee; and (g) Motors will employ a full time collector and strict management supervision will be maintained daily over collections.

Motors has represented that if, at any time, it changes the above-described loan policy guidelines it will notify Mr. Walt. Therefore, it is the responsibility of Mr. Walt to determine whether such changes materially affect the value of the Contracts. Mr. Walt represents that if the value of the Contracts is materially affected, such Contracts will be excluded from the collateral which secures the Loans by the Plan to Motors.

The Loans will also be secured by the Guaranty of the partners of Motors. In this regard, the partners of Motors have executed a blanket Guaranty in order to satisfy the requirements of PTE's 92-43 and 97-52. Mr. Walt is responsible for ascertaining that any Loans entered by the Plan pursuant to this proposed exemption are also covered by this blanket Guaranty or, if necessary, a new Guaranty will be executed. In addition, it is represented that all of the partners in Motors are jointly and severally liable for the debts of the partnership, specifically including the Loans.

It is represented that from time to time in order to secure its line of credit to Motors, PBNB may take a security interest in the Contracts. However, it is represented that such security interest will be at all times subordinated to 200% of the indebtedness of Motors to the Plan. Further, it is represented that other notes payable from Motors to its partners will be subordinated to the Loans. As of December 31, 2000, a total amount of \$4,994,560 was due to the partners of Motors under the terms of the notes, but such amount was subordinated to the indebtedness of Motors to the Plans.

In addition, it is represented that all of the Contracts provide Motors with recourse against the Employer for the amount of any defaulted Contracts. In this regard, should there be defaults on any of the Contracts, it is represented that the Employer will repurchase such Contracts from Motors after giving legal notice to the customer under Arkansas law. Once the Employer repurchases any defaulted Contracts, the Employer, not Motors, will repossess the vehicles. The Employer has informed the Department that for 1999 and 2000, the average number of Contracts equaled 1,100. Of these Contracts, twenty-one (21) vehicles were repossessed in 1999 and forty-six (46) vehicles were repossessed in 2000. The Employer maintains that defaults and repossessions constitute a very small percentage of the total number of Contracts outstanding at any time.

In addition to the responsibilities outlined above, Mr. Walt is responsible for monitoring Motors' compliance with the terms of the Loans and the Guaranty. In this regard, Mr. Walt has reviewed certain monthly reports (the Monthly Reports) which have been furnished by PBNB and by Boatmen's, the trustee at the time PTE 97-52 was granted. Mr. Walt represents that such Monthly Reports are appropriate for the purposes of monitoring the proposed transactions. If this proposed exemption is granted, it is represented that similar Monthly Reports will be provided to Mr. Walt and will be reviewed monthly by Mr. Walt, or more frequently as Mr. Walt determines is necessary.

In addition, Mr. Walt is responsible for receiving and reviewing the monthly financial statements for Motors and for the Employer and annual financial statements of the partners of Motors. Mr. Walt represents that this information will assist him in monitoring the credit-worthiness of the Employer and Motors. If there are any material decreases in the net worth of any of the parties involved, it is represented that Mr. Walt will liquidate the Loans at the next maturity date. In this regard, Mr. Walt represents that he places the most significance on the ability of the Employer to repurchase any of the Contracts that are in default and considers the net worth of the partners of Motors to be a secondary source of protection for the Plan. Mr. Walt further represents that if, in reviewing the monthly financial statements of the Employer, he determines that a decrease in the net worth of the Employer has impaired the Employer's ability to repurchase any of the Contracts, he will carefully review the aggregate net worth of the partners of Motors. After such review, if he

determines, based on his banking experience, judgment, and other factors, that the Plan is not properly protected, Mr. Walt will instruct the Trustee to liquidate the Loans at the next maturity date. In the event of a default by Motors on the Loans, Mr. Walt will be responsible for taking all necessary steps to protect the Plan and for enforcing all of the rights of the Plan, including pursuing the partners of Motors under the terms of the Guaranty.

In the opinion of Mr. Walt, the terms and conditions of the Loans and Guaranty are based on arm's-length considerations. After reviewing the proposed transactions, Mr. Walt represents that he would make the Loans, on behalf of the Bank, under the same terms to Motors. In conclusion, Mr. Walt has determined that the proposed transactions are in the best interest of the Plan and its participants and beneficiaries for the following reasons: (a) The Loans by the Plan to Motors are well collateralized; (b) the risk of loss to the Plan is almost non-existent; (c) the ninety (90) day maturity of the Loans will enable the Plan to shift its investments from the Loans in a short period of time, if necessary, to provide liquidity to the Plan; (d) the yield to the Plan is expected to be approximately 200 basis points greater than that of a ninety (90) day bank certificate of deposit; (e) the rate of return, which will be at all times two percentage points above the Federal Discount Rate, prevents the Plan from becoming locked into a below market interest rate and insures a favorable rate on a continuing basis; and (f) administration of the proposed transactions should generate less expense than that of other investments.

7. The applicant maintains that the wide diversity of customers executing the Contracts significantly spreads the risk to the Plan. Further, the Employer will bear all costs of filing the application for exemption, providing notice to interested persons, and paying for the services rendered by Mr. Walt, as independent fiduciary to the Plan. In the event that it becomes necessary to appoint a successor independent fiduciary (the Successor) to replace Mr. Walt, the applicant will notify the Department at least sixty (60) days in advance of such appointment. The applicant states that the successor will be independent and will possess comparable experience and responsibilities as those of Mr. Walt. In addition, it is represented that throughout the five (5) year duration of this proposed exemption, the Plan will not pay any fees or other expenses in

connection with the proposed transactions.

8. In summary, the applicant represents that the Loans will satisfy the criteria of section 408(a) of the Act because, among other things: (a) Mr. Walt, the independent fiduciary of the Plan, has agreed to review, approve, and monitor the terms and conditions of the Loans and the Guaranty; (b) Mr. Walt has represented that the Loans will be in the best interest of the participants and beneficiaries of the Plan; (c) the Loans will be short-term loans limited to no more than 15% of the total assets of the Plan; (d) the Loans will be adequately secured by a perfected security interest in the Contracts, through properly filed financing statements in conformity with the UCC provisions adopted in Arkansas; (e) the face amount of the Contracts will at all times exceed 200% of the total amount of the Loans; (f) the Loans are guaranteed by the partners of Motors; (g) the terms of the Contracts provide Motors with recourse to the Employer in the event of a default on any of the Contracts; and (h) the Plan will receive a return on the Loans of at least two percentage points above the Federal Discount Rate which is represented to be the prevailing fair market rate of return on comparable short-term investments.

**FOR FURTHER INFORMATION CONTACT:** Mr. Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll free number.)

**Prudential Insurance Company of America (Prudential Insurance) and Its Affiliates (collectively, Prudential) Located in Newark, NJ**

[Application No. D-11051]

#### *Proposed Exemption*

The Department is considering granting an exemption under the authority of section 408(a) of the Act (or ERISA) and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).<sup>4</sup>

Section I. Exemption for the Acquisition, Holding and Disposition of Prudential Stock

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(D), 406(b)(1) and section 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(D) and

<sup>4</sup> For purposes of this proposed exemption, references to provisions of the Act refer also to corresponding provisions of the Code.

(E) of the Code, shall not apply, effective December 13, 2001, to the acquisition, holding and disposition of common stock issued by Prudential Financial, Inc. (the Prudential Financial Stock) and/or common stock issued by a Prudential affiliate (the Prudential Affiliate Stock; together, the Prudential Stock), by Index and Model-Driven Funds that are managed by Prudential, in which client plans of Prudential invest, provided that the following conditions and the General Conditions of Section II are met:

(a) The acquisition or disposition of Prudential Stock is for the sole purpose of maintaining strict quantitative conformity with the relevant index upon which the Index or Model-Driven Fund is based, and does not involve any agreement, arrangement or understanding regarding the design or operation of the Fund acquiring Prudential Stock which is intended to benefit Prudential or any party in which Prudential may have an interest.

(b) Whenever Prudential Stock is initially added to an index on which an Index or Model-Driven Fund is based, or initially added to the portfolio of an Index or Model-Driven Fund, all acquisitions of Prudential Stock necessary to bring the Fund's holdings of such stock either to its capitalization-weighted or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or to its correct weighting as determined by the model which has been used to transform the index, occur in the following manner:

(1) Purchases are from, or through, only one broker or dealer on a single trading day;

(2) Based on the best available information, purchases are not the opening transaction for the trading day;

(3) Purchases are not effected in the last half hour before the scheduled close of the trading day;

(4) Purchases are at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from non-affiliated brokers;

(5) Aggregate daily purchases do not exceed 15 percent of the average daily trading volume for the security, as determined by the greater of either (i) the trading volume for the security occurring on the applicable exchange and automated trading system on the date of the transaction, or (ii) an aggregate average daily trading volume for the security occurring on the applicable exchange and automated trading system for the previous 5 business days, both based on the best

information reasonably available at the time of the transaction;

(6) All purchases and sales of Prudential Stock occur either (i) on a recognized U.S. securities exchange (as defined in Section III(k) below), (ii) through an automated trading system (as defined in Section III(j) below) operated by a broker-dealer independent of Prudential that is registered under the Securities Exchange Act of 1934 (the 1934 Act), and thereby subject to regulation by the Securities and Exchange Commission (the SEC), which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system (as defined in Section III(j) below) that is operated by a recognized U.S. securities exchange (as defined in Section III(k) below), pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

(7) If the necessary number of shares of Prudential Stock cannot be acquired within 10 business days from the date of the event which causes the particular Fund to require Prudential Stock, Prudential appoints a fiduciary which is independent of Prudential to design acquisition procedures and monitor compliance with such procedures.

(c) Subsequent to acquisitions necessary to bring a Fund's holdings of Prudential Stock to its specified weighting in the index or model pursuant to the restrictions described in Section I(b) above, all aggregate daily purchases of Prudential Stock by the Funds do not exceed on any particular day the greater of:

(1) 15 percent of the average daily trading volume for Prudential Stock occurring on the applicable exchange and automated trading system (as defined below) for the previous 5 business days, or

(2) 15 percent of the trading volume for Prudential Stock occurring on the applicable exchange and automated trading system (as defined below) on the date of the transaction, as determined by the best available information for the trades that occurred on such date.

(d) All transactions in Prudential Stock not otherwise described above in Section I(b) are either—(i) entered into on a principal basis in a direct, arm's length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of Prudential and is registered under the 1934 Act, and thereby subject to regulation by the SEC, (ii) effected on an automated trading

system (as defined in Section III(j) below) operated by a broker-dealer independent of Prudential that is subject to regulation by either the SEC or another applicable regulatory authority, or an automated trading system operated by a recognized U.S. securities exchange (as defined in Section III(k) below) which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized U.S. securities exchange (as defined in Section III(k) below), so long as the broker is acting on an agency basis.

(e) No transactions by a Fund involve purchases from, or sales to, Prudential (including officers, directors, or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the Fund with such party in interest would otherwise be subject to an exemption).

(f) No more than 5 percent of the total amount of Prudential Stock, that is issued and outstanding at any time, is held in the aggregate by Index and Model-Driven Funds managed by Prudential.

(g) Prudential Stock constitutes no more than 5 percent of any independent third party index on which the investments of an Index or Model-Driven Fund are based.

(h) A fiduciary of a plan which is independent of Prudential authorizes the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds Prudential Stock, pursuant to the procedures described herein.

(i) A fiduciary independent of the Prudential directs the voting of Prudential Stock held by an Index or Model-Driven Fund on any matter in which shareholders of Prudential are required or permitted to vote.

## Section II. General Conditions

(a) Prudential maintains or causes to be maintained for a period of six years from the date of the transaction the records necessary to enable the persons described in paragraph (b) of this Section II to determine whether the conditions of this exemption have been met, except that (1) a prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Prudential, the records are lost or destroyed prior to the end of the six year period, and (2) no party in interest other than Prudential shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by

section 4975(a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (b) below.

(b)(1) Except as provided in paragraph (b)(2) of this Section II and notwithstanding any provisions of section 504(a)(2) and (b) of the Act, the records referred to in paragraph (a) of this Section II are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service or the SEC,

(B) Any fiduciary of a plan participating in an Index or Model-Driven Fund who has authority to acquire or dispose of the interests of the plan, or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any plan participating in an Index or Model-Driven Fund or any duly authorized employee or representative of such employer, and

(D) Any participant or beneficiary of any plan participating in an Index or Model-Driven Fund, or a representative of such participant or beneficiary.

(2) None of the persons described in subparagraphs (B) through (D) of this Section II(b)(1) shall be authorized to examine trade secrets of Prudential or commercial or financial information which is considered confidential.

### Section III. Definitions

(a) The term “Index Fund” means any investment fund, account or portfolio sponsored, maintained, trustee, or managed by Prudential, in which one or more investors invest, and—

(1) Which is designed to track the rate of return, risk profile and other characteristics of an independently maintained securities Index, as described in Section III(c) below, by either (i) replicating the same combination of securities which compose such Index or (ii) sampling the securities which compose such Index based on objective criteria and data;

(2) For which Prudential does not use its discretion, or data within its control, to affect the identity or amount of securities to be purchased or sold;

(3) That contains “plan assets” subject to the Act, pursuant to the Department’s regulations (see 29 CFR 2510.3–101, Definition of “plan assets”—plan investments); and,

(4) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund which is intended to benefit Prudential or any party in which Prudential may have an interest.

(b) The term “Model-Driven Fund” means any investment fund, account or portfolio sponsored, maintained, trustee, or managed by Prudential, in which one or more investors invest, and—

(1) Which is composed of securities the identity of which and the amount of which are selected by a computer model that is based on prescribed objective criteria using independent third party data, not within the control of Prudential, to transform an independently maintained Index, as described in Section III(c) below;

(2) Which contains “plan assets” subject to the Act, pursuant to the Department’s regulations (see 29 CFR 2510.3–101, Definition of “plan assets”—plan investments); and

(3) That involves no agreement, arrangement, or understanding regarding the design or operation of the Fund or the utilization of any specific objective criteria which is intended to benefit Prudential or any party in which Prudential may have an interest.

(c) The term “Index” means a securities index that represents the investment performance of a specific segment of the public market for equity or debt securities in the United States, but only if—

(1) The organization creating and maintaining the index is—

(A) Engaged in the business of providing financial information, evaluation, advice or securities brokerage services to institutional clients,

(B) A publisher of financial news or information, or

(C) A public stock exchange or association of securities dealers; and,

(2) The index is created and maintained by an organization independent of Prudential; and,

(3) The index is a generally-accepted standardized index of securities which is not specifically tailored for the use of Prudential.

(d) The term “opening date” means the date on which investments in or withdrawals from an Index or Model-Driven Fund may be made.

(e) The term “Buy-up” means an acquisition of Prudential Stock by an Index or Model-Driven Fund in connection with the initial addition of such stock to an independently maintained index upon which the Fund is based or the initial investment of a Fund in such stock.

(f) The term “Prudential” refers to Prudential Insurance Company of America, its indirect parent and holding company, Prudential Financial, and any current or future affiliates, as defined below in paragraph (h).

(g) The term “Prudential Financial” refers to Prudential Financial, Inc., the indirect parent and holding company of Prudential Insurance Company of America.

(h) An “affiliate” of Prudential includes:

(1) Any person, directly or indirectly, through one or more intermediaries, controlling, controlled by or under common control with the person;

(2) Any officer, director, employee or relative of such person, or partner of any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner or employee.

(i) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(j) The term “automated trading system” means an electronic trading system that functions in a manner intended to simulate a securities exchange by electronically matching orders on an agency basis from multiple buyers and sellers, such as an “alternative trading system” within the meaning of the SEC’s Reg. ATS [17 CFR part 242.300], as such definition may be amended from time to time, or an “automated quotation system” as described in section 3(a)(51)(A)(ii) of the 1934 Act [15 USC 8c(a)(51)(A) (ii)].

(k) The term “recognized U.S. securities exchange” means a U.S. securities exchange that is registered as a “national securities exchange” under section 6 of the 1934 Act (15 USC 78f), as such definition may be amended from time to time, which performs with respect to securities the functions commonly performed by a stock exchange within the meaning of definitions under the applicable securities laws (e.g., 17 CFR part 240.3b–16).

**EFFECTIVE DATE:** If granted, this proposed exemption will be effective as of December 13, 2001.

### *Summary of Facts and Representations*

1. Prudential Insurance is a stock life insurance company, which converted from a mutual life insurance company on December 18, 2001. Prudential Insurance is organized under the laws of the State of New Jersey. Its principal place of business is located at Prudential Plaza, Newark, New Jersey. Prudential Insurance is licensed to conduct the insurance business in all 50 states comprising the United States, as well as in the District of Columbia.

As of June 30, 2001, Prudential Insurance had \$21.7 billion in total equity and \$303.1 billion in total assets.

Also as of that date, Prudential Insurance had—

- Total assets under management and administration of \$605.8 billion, consisting of total assets under management (including assets in general and separate accounts) of approximately \$393.5 billion, and additional assets in securities brokerage and bank custodial accounts and other assets under administration of \$212.3 billion.

- Total gross life insurance in force in the United States of \$1.3 trillion (including individual and group insurance), and

- Total gross life insurance in force in Japan and other countries outside the United States of \$508.2 billion (including individual and group insurance).

As of December 31, 2000 (the latest date for which such information is available), Prudential Insurance had the third largest individual life insurance business in the United States in terms of statutory in force premiums and in terms of total gross life insurance in force in the United States according to A.M. Best.

2. Prudential Insurance's principal products include individual and group life insurance contracts, endowment contracts, insurance contracts, annuities, including tax deferred annuities described in section 403(b) of the Code and individual retirement annuities described in section 408(b) of the Code, and a wide variety of pension contracts. Additionally, Prudential Insurance has a number of affiliates that provide financial services and products, including investment management, brokerage, and mutual funds, as well as real estate services. Prudential Insurance and its affiliates (together, Prudential) provide fiduciary and other services to "employee benefit plans" described in section 3(3) of the Act and to other plans described in section 4975(e)(1) of the Code.

As a mutual life insurance company, Prudential Insurance had no authorized, issued, or outstanding stock. Instead, policyholders of a mutual insurance company are both customers and owners of the company. Specifically, the life insurance, endowment, annuity, and certain other insurance and pension plan contracts issued by Prudential Insurance combined both insurance coverage and proprietary rights, so-called "membership interests."

Prudential Insurance demutualized on December 18, 2001. The company's Board of Directors, its policyholders, and the New Jersey Department of Banking and Insurance approved the proposed Plan of Reorganization prior to the demutualization. Following the

demutualization of Prudential Insurance and the simultaneous corporate reorganizations of its affiliates, Prudential Insurance and its affiliates are now owned indirectly by Prudential Financial, a holding company, the common stock of which (i.e., Prudential Financial Stock) is publicly traded, as is or may be certain of its debt or other securities. In connection with the demutualization, Prudential Insurance is distributing Prudential Financial Stock, cash and policy credits to eligible policyholders in exchange for their membership interests. Demutualization, registration of the Prudential Financial Stock and other Prudential securities under federal securities laws, an initial public offering of Prudential Financial Stock and its listing on the New York Stock Exchange took place during December 2001.<sup>5</sup>

3. Prudential Insurance and certain of its affiliates, including Prudential Investment Management, Inc., and Jennison Associates Capital Corporation, offer asset management and investment advisory services, insurance, securities brokerage and other types of financial services, as well as trust services, to ERISA-covered plans. Among the services offered are investment management or advisory services for investment accounts of ERISA-covered plans. These investment accounts may be structured as pooled and single client insurance company separate accounts, single client bank trust accounts and bank collective investment trust accounts in which employee benefit plans have invested. In some cases, the trust accounts will be maintained with a Prudential Insurance affiliate as trustee, while in other cases, the Prudential Insurance affiliated investment manager will direct investment of assets held by an unrelated trustee.

4. Prudential Insurance and its affiliates act as investment managers of institutional accounts, including those of employee benefit plans. As of June 30, 2001, the asset management units of Prudential managed approximately \$300 billion of Prudential's \$394 billion of total assets under management, as follows:

- \$109 billion of retail customer assets, including mutual funds and variable insurance and variable annuity products;
- \$91 billion of institutional customer assets; and

<sup>5</sup> With respect to the demutualization, Prudential Insurance has requested an administrative exemption from the Department. On September 27, 2001, a notice of proposed exemption was published in the **Federal Register** at 66 FR 49408.

- \$109 billion of insurance company general account assets.

In providing investment management services with respect to the assets of plans, Prudential is a "fiduciary" of plans, as defined in section 3(21) of the Act and a "party in interest," as defined in section 3(14)(A) and (B). Although it acts as an investment manager for the accounts, amounts invested in Prudential accounts are made at the direction of an independent plan fiduciary or by plan participants who have the ability to direct investments for their own plan accounts.<sup>6</sup>

5. Among the types of investment products and services Prudential provides to plans are Index and Model-Driven Funds. An Index Fund is an investment portfolio which may be, or form part of,<sup>7</sup> a single client trust account, a pooled or single client insurance company separate account, or a bank collective trust, with the investment objective of replicating the performance of an independently-maintained stock or bond index representing the performance of a specific segment of the public market for equity or debt securities. The Index Funds are passively-managed, in that the choice of stocks or bonds purchased and sold, and the volume purchased and sold, are made according to predetermined third party indexes rather than according to active decisionmaking on the basis of fundamental research on the valuation and prospects of the securities in which the portfolio invests. Plan fiduciaries often favor Index Funds because (a) their risks and returns tend to mirror an established market index, (b) they offer broad diversification within the asset class and strategy represented by the index, and (c) they are extremely competitive in fees and expenses.

A Model-Driven Fund is an investment portfolio which may be, or

<sup>6</sup> For a relatively few plan clients, Prudential has discretionary asset management authority to allocate a plan's assets among several approved investment accounts, subject to investment guidelines. In those cases, the plan's fiduciary, who is independent of Prudential, decides whether or not the plan will be permitted to invest in a particular account, including the Index or Model-Driven Funds described herein, and agrees to the particular investment guidelines used for the allocation among the approved accounts.

<sup>7</sup> In some cases, an Index or Model-Driven Fund may be a discrete portfolio of equity securities that is part of a larger investment fund. For example, an Index Fund may be a component of a balanced investment fund that includes both a portfolio of equities and a portfolio of debt securities and the entire balanced fund constitutes one insurance company separate account or bank trust account. Financial institutions commonly offer balanced investment funds because they offer plan fiduciaries and participants the advantage of diversifying investments across equities and bonds through a single investment.

form part of, a single client trust account, a pooled or single client insurance company separate account, or a bank collective trust, the performance of which is based on computer models using prescribed objective criteria to transform an independently-maintained stock or bond index representing the performance of a specific segment of the public market for equity or debt securities. The portfolio of a Model-Driven Fund is determined by the details of the computer model, which examines structural aspects of the stock or bond market rather than the underlying values of individual securities in which a portfolio may invest. An example of a Model-Driven Fund would include a fund which transforms an index, making investments according to a computer model which uses quantitative data as earnings, dividends and price to earnings ratios for common stocks included in the index with the goal of exceeding the investment returns achieved by the index.

Prudential represents that the process it uses for the establishment and operation of all Model-Driven Funds is disciplined and consistent with the quantitative nature of such funds. In this regard, objective rules are established for each model as part of the computer programming for the model. Once established, these computer programs are rarely changed. The data used by the programs are updated regularly by the electronic feeds of the quantitative information (e.g., changes in corporate earnings) necessary for analysis. The computer models generally cannot be overridden in the management of the portfolios except in the event of errors or questionable data from the usual sources of data input. For example, errors in data transmission may cause an unwarranted direction by the model to sell a security due to an erroneously low valuation for the security on a given day, or public notice of the SEC. In addition, allegations of accounting improprieties in the issuer's financial statements may cause a portfolio manager to override the model with respect to a direction by the model to buy that security, because the issuer's quantitative data used for the model may be drawn from the financial statements of the issuer of the security. Such exceptions are rare and must be justified on a case-by-case basis. Prudential represents, however, that it will not exercise any discretion to override the computer model with respect to the acquisition, holding or disposition of Prudential Stock. Such

transactions will always follow the output of the relevant computer model.

6. Prudential currently offers a number of Funds that are invested according to the criteria of various third party indexes or are model-driven based on such indexes. These indexes are compiled by financial information agencies that are engaged in the provision of financial information or securities brokerage services to institutional investors and/or are publishers of financial information. For example, Prudential offers some Funds that track the Wilshire 5000 Total Market Index,<sup>8</sup> the Russell 2000 Index,<sup>9</sup> and the Standard & Poor's 500 Composite Stock Price Index (the S&P 500 Index).<sup>10</sup> In each instance, the indexes are compiled by organizations that are independent of Prudential and are generally-accepted standardized indexes of securities that are not tailored for the use of Prudential.

7. On or after the effective date of Prudential Insurance's demutualization and initial public offering of Prudential Financial Stock, Prudential Insurance represents that the indexes employed by Index and Model-Driven Funds may include Prudential Financial Stock and/or Prudential Affiliate Stock. Prudential represents that the ability of all Funds to invest in Prudential Stock, when that stock is included in an index, is necessary to ensure tracking of the indexes. In addition, the ability of the Model-Driven Funds to invest in Prudential Stock, when that stock is included in the index on which the model is based, avoids disruption to the computer modeling that is designed to transform the index in the manner approved by plans when the investment in the Model-Driven Fund is authorized.

8. Accordingly, Prudential Insurance requests an administrative exemption

<sup>8</sup>The Wilshire 5000 Total Market Index was established and is maintained by Wilshire Associates Incorporated, which is not an affiliate of Prudential. The Wilshire 5000 Total Market Index is a market weighted index of returns of over 6,500 U.S. stocks with readily available price data. It is the broadest U.S. equity index available and reflects the performance of the organized securities exchanges as well as the Over the Counter markets.

<sup>9</sup>The Russell 2000 Index was established and is maintained by the Frank Russell Company, which is not an affiliate of Prudential. The Russell 2000 Index is a subset of the larger Russell 3000 Index. The Russell 3000 Index consists of the largest 3,000 publicly-traded stocks of U.S. domiciled corporations, identified by the Frank Russell Company, and includes large, medium and small stocks.

<sup>10</sup>The S&P 500 Index is composed of 500 stocks that are traded on the New York Stock Exchange and the NASDAQ National Market System. The S&P 500 Index is a market-weighted index (i.e., shares outstanding times the stock price) in which each company's influence on the Index's performance is directly proportional to its market value.

from the Department. If granted, the exemption will permit Prudential Insurance and its current and future affiliates to maintain individual and pooled separate accounts, collective trusts, and single client trusts that hold Prudential Stock, provided certain conditions enumerated in the operative language of the exemption are met.

Specifically, the exemption will allow Index and Model-Driven Funds which are managed by Prudential Insurance or its affiliates, in which client plans of Prudential participate, to invest in Prudential Stock if such stock is included among the securities listed in the index utilized by the Fund. Prudential Insurance is not requesting, nor is the Department providing, administrative exemptive relief herein for plans sponsored by Prudential. Prudential believes that investments on behalf of its in house plans in Index and Model-Driven Funds have been made (and will be made) in accordance with the statutory exemption provided under section 408(e) of the Act.<sup>11</sup> Therefore, the subject exemption will apply to client plans of Prudential only. With respect to Prudential client plans, Prudential Insurance states that plan fiduciaries which are independent of Prudential have authorized or will authorize the investment of a plan's assets in an Index or Model-Driven Fund which acquires, holds, or disposes of Prudential Stock pursuant to procedures described herein.

Prudential Insurance requests that the proposed exemption be made effective as of December 13, 2001, which is the initial public offering date for Prudential Financial Stock as well as the date such stock commenced trading on the New York Stock Exchange. Prudential Insurance states that any exemptive relief for cross-trades of securities, including Prudential Stock, by Index and Model-Driven Funds maintained by it should be considered separately.<sup>12</sup>

9. Prudential Insurance states that the proposed exemption is necessary to allow Funds holding plan assets to purchase and hold Prudential Stock in order to replicate, properly, the capitalization-weighted or other specified composition of Prudential Stock in an independently-maintained,

<sup>11</sup>The Department is not providing an opinion in this proposed exemption on whether the conditions of section 408(e) of the Act have been or will be met for such transactions.

<sup>12</sup>In this regard, the Department directs interested persons to the Proposed Class Exemption for Cross-Trades of Securities by Index and Model-Driven Funds (the Cross-Trading Proposal) which was published in the **Federal Register** on December 15, 1999 (64 FR 70057).

third party index used by an Index Fund or to achieve the desired transformation of an index used to create a portfolio for a Model-Driven Fund.

In addition, Prudential Insurance represents that when Prudential Stock is added to an index on which a Fund is based, or when Prudential Stock is added to the portfolio of a Fund which tracks an index that includes Prudential Stock, all acquisitions necessary, as an initial matter, to bring the Fund's holdings of Prudential to its capitalization or other specified weighting in the applicable index,<sup>13</sup> will comply with conditions (see Section I(b)(1)–(7) above) that are designed to prevent possible market price manipulation and which are based, in part, on the restrictions of SEC Rule 10b–18.<sup>14</sup>

The conditions required for a “Buy-up” of Prudential Stock are as follows:

- Purchases are from, or through, only one broker or dealer on a single trading day;
- Based on the best available information, purchases are not the opening transaction for the trading day;
- Purchases are not be effected in the last half hour before the scheduled close of the trading day;
- Purchases are at a price that is not higher than the lowest current independent offer quotation, determined on the basis of reasonable inquiry from non-affiliated brokers;
- Aggregate daily purchases do not exceed 15 percent of the average daily trading volume for the security, as determined by the greater of (i) the trading volume for the security occurring on the applicable exchange and automated trading system on the date of the transaction, or (ii) an aggregate average daily trading volume for the security occurring on the applicable exchange and automated trading system for the previous 5 business days, both based on the best information reasonably available at the time of the transaction;
- All purchases and sales of Prudential Stock occur either (i) on a

recognized U.S. securities exchange [as defined in Section III(k)], (ii) through an automated trading system [as defined in Section III(j)] operated by a broker-dealer independent of Prudential that is registered under the 1934 Act, and thereby subject to regulation by the SEC, which provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) through an automated trading system [as defined in Section III(j)] that is operated by a recognized U.S. securities exchange, pursuant to the applicable securities laws, and provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer; and

- If the necessary number of shares of Prudential Stock cannot be acquired within 10 business days from the date of the event which causes the particular Fund to require Prudential Stock, Prudential appoints an independent fiduciary to design acquisition procedures and monitor compliance with such procedures.

10. Prudential Insurance states that, if an independent fiduciary is required, such independent fiduciary and its principals will be parties completely unrelated to Prudential. The independent fiduciary will also be experienced in developing and operating investment strategies for individual and collective investment vehicles that track third party indexes. Furthermore, the independent fiduciary will not act as the broker for any purchases or sales of Prudential Stock and will not receive any consideration as a result of the initial acquisition program.

As its primary goal, the independent fiduciary will develop trading procedures that minimize the market impact of purchases made pursuant to the initial acquisition program by the particular Fund. Thus, Prudential Insurance believes that, under the trading procedures established by the independent fiduciary, the trading activities will be conducted in a low profile, mechanical, non-discretionary manner and involve a number of small purchases over the course of each day, randomly-timed. Prudential Insurance further believes that such a program will allow Prudential to acquire the necessary shares of Prudential Stock for the Funds with minimum impact on the market and in a manner that is in the best interests of any employee benefit plans that participate in such Funds.

The independent fiduciary will also be required to monitor compliance with the trading program and procedures

developed for the initial acquisition of Prudential Stock. During the course of any initial acquisition program, the independent fiduciary will be required to review the activities weekly to determine compliance with the trading procedures and notify Prudential should any non-compliance be detected. Should the trading procedures need modifications due to unforeseen events or consequences, the independent fiduciary will be required to consult with Prudential and must approve in advance any alteration of the trading procedures.

11. Subsequent to the initial acquisitions necessary to bring a Fund's holdings of Prudential Stock to their specified weightings in the index or model pursuant to the restrictions described above, all aggregate daily purchases of Prudential Stock by the Funds will not exceed on any particular day the greater of—

- 15 percent of the average daily trading volume for Prudential Stock occurring on the applicable exchange and automated trading system for the previous 5 business days, or
- 15 percent of the trading volume for Prudential Stock occurring on the applicable exchange and automated trading system on the date of the transaction, as determined by the best available information for the trades that occurred on such date.

12. Prudential Insurance represents that all transactions by the Funds involving Prudential Stock which do not occur in connection with a Buy-up of such stock by a Fund, as described above, will be either (a) entered into on a principal basis in a direct arm's length transaction with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of Prudential and is registered under the 1934 Act, and thereby subject to regulation by the SEC; (b) effected on an automated trading system (as defined in Section III(j) of the proposed exemption) operated by a broker-dealer independent of Prudential that is either registered under the 1934 Act, and thereby subject to regulation by the SEC or another applicable regulatory agency, or an automated trading system operated by a recognized U.S. securities exchange (as defined in Section III (k)) which, in either case, provides a mechanism for customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (c) through a recognized U.S. securities exchange (as defined in Section III(k)),

<sup>13</sup> These instances are referred to herein as a “Buy-up.” Prudential Insurance believes that acquisitions of Prudential by an Index or Model-Driven Fund in a “Buy-up” will occur within 10 business days from the date of the event which causes the particular Fund to acquire Prudential. Prudential does not believe that the amounts of Prudential acquired by a Fund in a “Buy-up” will be significant. In this regard, the Department notes that the conditions required herein are designed to minimize the market impact of purchases made by the Funds in any “Buy-up” of Prudential.

<sup>14</sup> SEC Rule 10b–18 provides a “safe harbor” for issuers of securities from section 9(a)(2) of the 1934 Act and SEC Rule 10b–5 (which generally prohibits persons from manipulating the price of a security and engaging in fraud in connection with the purchase or sale of a security).

so long as the broker is acting on an agency basis.<sup>15</sup>

13. Prudential Insurance represents that all acquisitions, holdings, and dispositions of Prudential Stock by Index or Model-Driven Funds maintained by Prudential will also not involve purchases from or sales to Prudential (including officers, directors or employees thereof), or any party in interest that is a fiduciary with discretion to invest assets into the Fund (unless the transaction by the Fund with such party in interest is otherwise subject to an exemption).<sup>16</sup>

14. Prudential Insurance represents that no more than 5 percent of the total outstanding shares of Prudential will be held in the aggregate by the Index or Model-Driven Funds managed by Prudential. In addition, for purposes of acquisitions, holdings and dispositions of Prudential Stock by the Funds, Prudential Insurance states that such stock will not constitute more than 5 percent of the value of any independent third party index on which investments of an Index or Model-Driven Fund are based. Therefore, Prudential Insurance requests that the proposed exemption allow Prudential to design a passive investment strategy for an Index or Model-Driven Fund which seeks to track any index that contains Prudential Stock, or which transforms such an index in a fashion prescribed by the model, as long as the Prudential Stock does not constitute more than 5 percent of the index.

With respect to an index's specified composition of particular stocks in its portfolio, Prudential Insurance states that future Funds may track an index where the selection of a particular stock by the index and the amount of stock to be included in the index is not based on the market capitalization of the corporation issuing such stock. Therefore, since an independent

organization may choose to create an index where there are other index weightings for stocks composing the index, the Prudential Insurance requests that the exemption allow for Prudential Stock to be acquired by a Fund in the amounts which are specified by the particular index, subject to the other restrictions imposed under this proposed exemption. In addition, Prudential Insurance represents that, in all instances, the acquisition, holding or disposition of Prudential Stock by a Fund is for the sole purpose of maintaining quantitative conformity with the relevant index upon which the Fund is based, or in the case of a Model-Driven Fund, a modified version of such an index as created by a computer model based on prescribed objective criteria and third party data.

15. Prudential Insurance will appoint an independent fiduciary to direct the voting of any Prudential Stock held by the Funds. The independent fiduciary will be a firm specializing in corporate governance issues and proxy voting on behalf of public and private pension funds. The independent fiduciary will be required to develop and follow standard guidelines and procedures for the voting of proxies by institutional fiduciaries.

Prudential Insurance will provide the independent fiduciary with all necessary information regarding the Funds that hold Prudential Stock on the record date for Prudential's shareholder meetings, and all proxy and consent materials with respect to Prudential Stock. The independent fiduciary will maintain records with respect to its activities as an independent fiduciary on behalf of the Funds, including the number of shares of Prudential Stock voted, the manner in which such shares were voted, and the rationale for the vote if the vote was not consistent with the independent fiduciary's procedures and current voting guidelines in effect at the time of the vote. The independent fiduciary will supply Prudential with the information after each shareholder meeting. The independent fiduciary will be required to acknowledge that it will be acting as a fiduciary with respect to the plans which invest in the Funds which own Prudential Stock, when voting such stock.

16. In summary, it is represented that the subject transactions have met or will meet the statutory criteria for an exemption under section 408(a) of the Act because:

(a) Each Index or Model-Driven Fund involved has been based or will be based on an index, as defined in Section III(c) above;

(b) The acquisition, holding and disposition of Prudential Stock by the Index or Model-Driven Fund has been or will be for the sole purpose of maintaining strict conformity with the relevant index upon which an Index or Model-Driven Fund is based, and will not involve an agreement, arrangement or understanding regarding the design or operation of the Fund acquiring Prudential Stock which is intended to benefit Prudential or any party in which Prudential may have an interest;

(c) Whenever Prudential Stock is initially added to an index on which a Fund is based, or initially added to the portfolio of a Fund (i.e., a Buy-up), all acquisitions of Prudential Stock necessary to bring the Fund's holdings of such stock either to its capitalization-weighted or other specified composition in the relevant index, as determined by the independent organization maintaining such index, or its correct weighting as determined by the computer model which has been used to transform the index, has been or will be restricted by conditions which are designed to prevent possible market price manipulations;

(d) Subsequent to acquisitions necessary to bring a Fund's holdings of Prudential Stock to its specified weighting in the index or model, pursuant to the restrictions above, all aggregate daily purchases of Prudential Stock by the Funds have not exceeded nor will exceed the greater of (i) 15 percent of the average daily trading volume for the Prudential Stock occurring on the applicable exchange and automated trading system for the previous 5 business days, or (ii) 15 percent of the trading volume for Prudential Stock occurring on the applicable exchange and automated trading system on the date of the transaction, as determined by the best available information for the trades that occurred on such date;

(e) All transactions in Prudential Stock, other than acquisitions of such stock in a Buy-up described above, have been or will be either (i) entered into on a principal basis with a broker-dealer, in the ordinary course of its business, where such broker-dealer is independent of Prudential and is registered under the 1934 Act, and thereby subject to regulation by the SEC, (ii) effected on an automated trading system operated by a broker-dealer independent of Prudential that is subject to regulation by either the SEC or another applicable regulatory authority, or an automated trading system operated by a recognized U.S. securities exchange which, in either case, provides a mechanism for

<sup>15</sup> The Department notes that no relief is being provided herein for purchases and sales of securities between a Fund and a broker-dealer acting as principal, which may be considered prohibited transactions as a result of such broker-dealer being a party in interest under section 3(14) of the Act, with respect to any plans that are investors in the Fund. However, such transactions may be covered by one or more of the Department's existing class exemptions. For example, Prohibited Transaction Class Exemption 84-14 (49 FR 9497, March 13, 1984) permits, under certain conditions, parties in interest to engage in various transactions with plans whose assets are invested in an investment fund managed by a "qualified professional asset manager" (i.e., a QPAM) who is independent of the parties in interest (with certain limited exceptions) and meets specified financial standards.

<sup>16</sup> In this regard, the Department is providing no opinion herein on whether such principal transactions would be covered by any existing exemption.

customer orders to be matched on an anonymous basis without the participation of a broker-dealer, or (iii) effected through a recognized U.S. securities exchange (as described herein) so long as the broker is acting on an agency basis;

(f) No transactions by a Fund has involved or will involve purchases from or sales to Prudential (including officers, directors or employees thereof), or any party in interest that is a fiduciary with discretion to invest plan assets into the Fund (unless the transaction by the Fund with such party in interest would otherwise be subject to an exemption);

(g) No more than 5 percent of the total amount of Prudential Stock that is issued and outstanding at any time has been held or will be held, in the aggregate, by Index or Model-Driven Funds managed by Prudential;

(h) Prudential Stock has not constituted nor will constitute more than 5 percent of the value of any independent third party index on which investments of an Index or Model-Driven Fund are based;

(i) A plan fiduciary independent of Prudential has authorized or will authorize the investment of such plan's assets in an Index or Model-Driven Fund which purchases and/or holds Prudential Stock, pursuant to the procedures described herein; and

(j) A fiduciary independent of Prudential will direct the voting of Prudential Stock held by an Index or Model-Driven Fund on any matter in which shareholders of Prudential are required or permitted to vote.

#### *Notice to Interested Persons*

Notice of the proposed exemption will be mailed by first-class mail to interested persons, including the appropriate fiduciaries of employee benefit plans currently invested in the Index and/or Model-Driven Funds that may acquire and hold Prudential Stock. The notice will include a copy of the notice of proposed exemption, as published in the **Federal Register**, and a supplemental statement, as required under 29 CFR 2570.43(b)(2), which shall inform interested persons of their right to comment and/or to request a hearing with respect to the proposed exemption. All notices will be sent to interested persons within 30 days of the publication of the proposed exemption in the **Federal Register**. Any written comments and/or requests for a hearing are due within 60 days after the date of publication of the pendency notice in the **Federal Register**.

In addition, Prudential will provide, upon request, a copy of the proposed

exemption and, if granted, a copy of the final exemption to all ERISA-covered plans which invest in any Index or Model-Driven Fund containing Prudential Stock in their respective portfolios after the date the final exemption is published in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan D. Broady of the Department, telephone (202) 693-8556. (This is not a toll-free number.)

#### *General Information*

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 15th day of January, 2002.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Pension and Welfare Benefits,  
Administration, U.S. Department of Labor.*

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## **DEPARTMENT OF LABOR**

### **Pension and Welfare Benefits Administration**

**[Application Number D-11041]**

#### **Notice of Proposed Individual Exemption To Modify Prohibited Transaction Exemption 90-23 (PTE 90- 23); Prohibited Transaction Exemption 90-31 (PTE 90-31) and Prohibited Transaction Exemption 90-33 (PTE 90- 33) Involving J.P. Morgan Chase & Company and Its Affiliates (the Applicants) Located in New York, NY**

**AGENCY:** Pension and Welfare Benefits Administration, Department of Labor.

**ACTION:** Notice of proposed individual exemption to modify PTE 90-23; PTE 90-31; and PTE 90-33 (collectively, the Exemptions).

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed individual administrative exemption which, if granted, would amend: PTE 90-23 (55 FR 20545, May 17, 1990), an exemption which was granted to J.P. Morgan Securities, Inc.; PTE 90-31 (55 FR 23144, June 6, 1990), an exemption which was granted to Chase Manhattan Bank; and PTE 90-33 (55 FR 23151, June 6, 1990), an exemption which was granted to Chemical Banking Corporation.<sup>1</sup> The Exemptions provide relief for the operation of certain asset pool investment trusts and the acquisition, holding and disposition by employee benefit plans (the Plans) of certificates or debt instruments that are issued by such trusts with respect to which one of the Applicants is the lead underwriter or a co-managing underwriter. If granted, this proposed amendment would permit the trustee of the trust to be an affiliate of the underwriter. If adopted, the proposed amendment would affect the participants and beneficiaries of the Plans participating

<sup>1</sup> The notice of proposed exemption for PTE 90-23 was published on February 20, 1990 at 55 FR 5906; the notice of proposed exemption for PTE 90-31 was published on February 21, 1990 at 55 FR 6074; and the notice of proposed exemption for PTE 90-33 was published on February 21, 1990 at 55 FR 6082.