

described for the assessment fee and because the audit is generally limited to one day. As previously described, the audit fee would include amounts for travel, and, similar to assessments, OSHA will bill the NRTL for actual travel expenses.

#### *Miscellaneous Fees*

The sample fee schedule only shows the average cost for one full day of staff time. OSHA would use this fee primarily in cases of refunding the assessment fee. OSHA will also charge a fee for late payment of the annual audit fee. The amount for the late fee is based on 1 hour of staff time.

#### **Final Decision**

OSHA performed its annual review of the fees it currently charges to Nationally Recognized Testing Laboratories, as provided under 29 CFR 1910.7(f). Based on this review, OSHA determined that certain fees warranted change, as detailed in this notice. As a result, OSHA now establishes the revised fees by adopting the Nationally Recognized Testing Laboratory Program Fees Schedule shown as Table A above, which was effective as of January 1, 2002, as provided in the preliminary notice published on December 12, 2001 (66 FR 64274). This fee schedule will remain in effect until superseded by a later fee schedule. OSHA will provide the public an opportunity to comment on any future changes to the fees.

Signed at Washington, DC, this 17 day of January, 2002.

**John L. Henshaw,**

*Assistant Secretary.*

[FR Doc. 02-2643 Filed 2-4-02; 8:45 am]

BILLING CODE 4510-26-P

## **DEPARTMENT OF LABOR**

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

[Application No. D-10891, et al.]

#### **Proposed Exemptions; Connecticut Plumbers and Pipefitters Pension Fund (the Pension Fund), Connecticut Pipe Trades Local No. 777 Annuity Fund (the Annuity Fund); Connecticut Pipe Trades Health Fund (the Health Fund) (Collectively the Funds)**

**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.

#### **Connecticut Plumbers and Pipefitters Pension Fund (the Pension Fund), Connecticut Pipe Trades Local No. 777 Annuity Fund (the Annuity Fund); Connecticut Pipe Trades Health Fund (the Health Fund) (Collectively the Funds), Located in Manchester, Massachusetts**

[Exemption Application Nos. D-10891; D-10892 and L-10893]

#### **Proposed Exemption**

The Department of Labor (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), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975(a) and (b) of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to the purchase on September 1, 1999 (the Purchase) by the Health Fund of the common stock of Employee Benefit Administrators, Inc. (EBPA Stock) from Michael W. Daly and Virginia S. Daly (the Dalys), parties in interest with respect to the Health Fund, and the subsequent reallocation of the purchase price (the Reallocation) among the Funds, including "makewhole" payments (Makewhole Payments) representing lost earnings in connection with the Purchase, provided that the following conditions are satisfied:

(a) The Purchase was a one-time transaction for a lump sum cash payment;

(b) The Purchase price was no more than the fair market value of EBPA Stock as of the date of the Purchase;

(c) The fair market value of the EBPA Stock was determined by an independent, qualified, appraiser;

(d) The Funds paid no commissions or other expenses relating to the Purchase;

(e) The proposed Reallocation will be made in connection with the original payment by the Pension Fund and the Annuity Fund for EBPA Stock resulting from the original allocation (the Original Allocation);

(f) The Makewhole Payments to be made by the Health Fund to the Pension Fund and the Annuity Fund represent an amount to provide the Pension Fund and the Annuity Fund with a rate of return equal to the total accrued but unpaid interest due as of the date of grant of this exemption as a result of the Original Allocation on September 1, 1999; and

(g) An independent fiduciary has negotiated, reviewed, and approved the terms of the Reallocation and will ensure the current and future payments by the Funds in connection with services provided by the administrative affiliate will reflect actual expenditures by the Funds.

*Effective Date of Exemption:* The effective date of this exemption is September 1, 1999.

#### Summary of Facts and Representations

1. The Annuity Fund is a defined contribution employee pension plan located in Manchester, Connecticut. It provides for contributions by employers, and permits the participants to invest the contributions in alternatives provided by Putnam Investments, the Annuity Fund's recordkeeper. At the time of the transaction, the Annuity Fund had 1,518 participants and assets as of January 31, 1999 of \$21,540,687.33.

The Pension Fund is a non-contributory defined benefit plan located in Manchester, Connecticut. The Pension Fund employs 13 investment managers for the assets. At the time of the transaction, the Pension Fund had 1,587 plan participants and assets as of January 31, 1999 of \$209,288,337.71.

The Health Fund is non-contributory and has 2,263 plan participants. The assets are maintained at Salomon Smith Barney, and Olson, Mobeck & Associates, Inc. acts as investment manager. At the time of the transaction, the fair market value of the Health Fund's assets was \$20,651,136.78.

At the time of the Purchase, less than approximately 1% of the total assets of each respective plan were involved in the subject transaction. The Funds are multiemployer plans within the meaning of section 3(37)(A) of the Act,

and were established and are maintained pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947. The Funds are jointly managed by an equal number of Trustees appointed by management and the union.

2. Prior to September 1, 1999, the Funds employed two outside administrators. One administrator, Insurance Programmers, Inc. (IPI) provided services to the Annuity Fund and the Pension Fund. For the Pension Fund, IPI processed contributions and pension applications, issued monthly pension checks and quarterly statements and provided information for the annual actuarial valuation. Its charges totaled \$105,600 in the last year of its retention. For the Annuity Fund, IPI processed contributions, posted receipts to Putnam Investments, performed recordkeeping duties, and processed withdrawal applications. IPI's charges for the Annuity Fund were \$84,500. The second administrator, EBPA provided services to the Health Fund. It processed contributions, determined eligibility, paid both health and disability claims, maintained claims records, coordinated pre-admission certifications and utilization reviews and did COBRA administration. Its annual charges were \$424,500.

In 1998, the Trustees of the Annuity and Pension Funds decided to explore alternatives for the Funds' administration. Since some of the Trustees of the Annuity and Pension Funds also served as Trustees of the Health Fund, and the Funds collectively served roughly the same group of participants and beneficiaries, the Trustees decided to consider unified administration for the Funds. Accordingly, the Trustees decided to bring the administration in-house. Due to concern about potential disruption to participants and beneficiaries, the Trustees further decided to explore the retention of existing administrative personnel through the purchase of EBPA, which had the most day-to-day contact with participants and beneficiaries.

The Trustees sought advice from the Segal Company (Segal), a nationally known actuarial and benefits consulting firm that represents multiemployer trust funds. On April 29, 1998, Segal released a feasibility study to the Trustees, which concluded that, from a financial and operational perspective, the purchase of EBPA made good business sense.

3. The Trustees represent that the motivation for the Funds Purchase of EBPA was solely to benefit the Funds' interests. The Trustees further represent that (i) the annual operating expenses

with in-house administration would be approximately \$454,450 versus the \$614,600 paid by the Funds for outside administration in 1998; (ii) in-house administration would give the Funds more direct control over the administrative process and better access to data so that the Trustees could more easily shift priorities or make changes in the administrative processes; and (iii) the in-house staff would be employees of the Funds, customer service should be more sensitive and responsive to the needs of the participants and beneficiaries, problems could be solved more quickly, and the Trustees would not have to coordinate between different vendors.

4. The Trustees obtained the services of Marena, Pia and Associates, LLC (MPA), to perform an appraisal of the EBPA Stock. The valuation was performed by Kenneth Pia, a principal of MPA. Mr. Pia is the Director of Valuation and Litigation Services at MPA, a certified public accountant, an Accredited Senior Appraiser of the American Society of Appraisers, and a Certified Valuation Analyst of the National Association of Certified Valuation Analysts. Mr. Pia represents that he and his firm are independent of the parties involved in the Purchase.

The appraisal sought the fair market value of EBPA, which it defined as the price at which the property would change hands between a willing buyer and willing seller, neither being under a compulsion to transact and both having reasonable knowledge of all relevant facts and circumstances. In arriving at the value, the appraisal considered all of the factors set forth in Revenue Ruling 59-60. As for the primary methodology, Mr. Pia chose the earnings-based approach, specifically the capitalization of forecasted next year earnings method. MPA concluded that the fair market value of 100 percent of the stock of EBPA was \$277,000.

5. The Funds and the Dalys reached an agreement on the sale of the EBPA Stock and terms of the Dalys employment on September 1, 1999. The Funds purchased for cash, 100 percent of the EBPA Stock at a price of \$250,000. Mr. Dalys annual salary was set at \$105,000. The ownership of the EBPA stock also enabled the Funds to acquire the tangible assets, primarily office equipment and fixtures, used by EBPA in the administration of the Health Fund's business. The Funds and the Dalys also agreed upon an employment contract for a term of five years, which provides for termination upon just cause prior to that time.

6. The Trustees represent they were not aware that the Purchase would

constitute a violation of the prohibited transaction provisions of the Act, nor were they advised of the violation at the time of the transaction.<sup>1</sup> The Trustees relied upon the advice of Vincent F. OHara of Holm & O'Hara who was counsel to the Trustees regarding ERISA matters throughout the process of self-administration. Only after the Purchase did the Trustees legal counsel conclude that the trustees needed a prohibited transaction exemption. Subsequently, the Trustees retained outside counsel to file an application for a retroactive exemption with the Department.

7. The Funds allocated the purchase price pursuant to an allocation study based on the projected comparative administrative needs of each of each of the Funds (the Original Allocation) performed by Segal. Specifically, the Health Fund paid \$110,000, the Pension Fund paid \$97,500 and the Annuity Fund paid \$42,500.<sup>2</sup> The Department reviewed the Original Allocation and discovered that Segal's analysis did not include the cost to the Funds of paying the claims.

8. As a result of the Original Allocation's deficiencies, the Trustees engaged Peter D. Graeb, CPA (Mr. Graeb) of Beers, Hamerman & Company, P.C. (BHC) to determine the Reallocation of the Purchase price. BHC determined that the Reallocation should yield the following allocation of the Purchase price: Health Fund 77%; Pension fund 18%; and the Annuity Fund 5%. Applying the Reallocation methodology, the allocation of the purchase price will be: Health Fund paying \$192,500; the Pension Fund paying \$45,000 and the Annuity Fund paying \$12,500.

Furthermore, as a result of the Department's review and determination that the Original Acquisition was not allocated equitably among the Funds, it has been determined that the Makewhole Payment should be made by the Health Fund to the Pension Fund and the Annuity Fund representing lost earnings to the Funds as a result of the Original Allocation. The Makewhole Payment will consist of the Health Fund paying an additional \$82,500 of the purchase price of EBPA, with the Pension Fund receiving \$52,500 and the

Annuity Fund receiving \$30,000 of the additional \$82,500 paid by the Health Fund. Mr. Graeb also calculated the lost earnings in connection with the Original Acquisition. Mr. Graeb's calculation of the lost earnings or Makewhole Payment concluded that the Health Fund earned a return for the 23-month period between August 1, 1999 through June 30, 2001 of 11.02%. This was based on the net investment return, per audited financial statement for the fiscal year August 1, 1999 through June 30, 2001 and the preliminary accounting for the fiscal year ending June 30, 2001.

Applying that return yields the following numbers: the Health Fund earned \$9,092 on the \$85,000 it underpaid. Sharing that amount in the percentages derived from the Original Allocation study would yield \$52,500 and interest of \$5,786 to the Pension Fund and \$30,000 and \$3,306 to the Annuity Fund from the period August 1, 1999 through June 30, 2001. Therefore, the Makewhole Payments will represent an amount that provides the Pension Fund and the Annuity Fund with a rate of return equal to the total accrued but unpaid interest due at the time of grant of this exemption as a result of the Original Allocation.

9. An independent party, Robert Nagle (Mr. Nagle), will serve as the independent fiduciary for the Funds with respect to the proposed Reallocation between the Funds. Mr. Nagle has experience with employee benefit plans and has served as a court ordered fiduciary in several cases, including service at the behest of the Department. Mr. Nagle has no prior connection to the Trustees. Mr. Nagle will assure that the Reallocation accurately reflects the Funds' respective equity interest in the administrative subsidiary and that the Health Fund has reimbursed the Pension Fund and the Annuity Fund for the difference between their original investments and the reallocated amounts, plus the Makewhole Payments. In addition, Mr. Nagle will confirm on an annual basis that the expenses of the administrative subsidiary are being properly allocated to the Funds based on actual expenditures of each Fund.

10. In summary, the Trustees represent that the requested retroactive individual exemption will satisfy the criteria of section 408(a) of the Act for the following reasons:

(a) The Purchase was a one-time transaction for a lump sum cash payment;

(b) The Purchase price was no more than the fair market value of EBPA Stock as of the date of the Purchase;

(c) The fair market value of the EBPA Stock was determined by an independent, qualified, appraiser;

(d) The Funds paid no commissions or other expenses relating to the Purchase;

(e) The proposed Reallocation will be made in connection with the original payment by the Pension Fund and the Annuity Fund for EBPA Stock resulting from the Original Allocation;

(f) The Makewhole Payments to be made by the Health Fund to the Pension Fund and the Annuity Fund represent an amount to provide the Pension Fund and the Annuity Fund with a rate of return equal to the total accrued but unpaid interest due as of the date of grant of this exemption as a result of the Original Allocation on September 1, 1999; and

(g) An independent fiduciary has negotiated, reviewed, and approved the terms of the Reallocation and will ensure the current and future payments by the Funds in connection with services provided by the administrative affiliate will reflect actual expenditures by the Funds.

*Notice to Interested Persons:* Notice of the proposed exemption shall be given to all interested persons in the manner agreed upon by the Trustees and Department within 15 days of the date of publication in the **Federal Register**. Comments and requests for a hearing are due forty-five (45) days after publication of the notice in the **Federal Register**.

**FOR FURTHER INFORMATION CONTACT:** Khalif Ilias Ford of the Department, telephone (202) 693-8540. (This is not a toll-free number.)

**Pacific Investment Management Company, LLC (PIMCO), Located in Newport Beach, CA**

[Application No. D-11005]

#### **Proposed Exemption**

Based on the facts and representations set forth in the application, 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>3</sup>

#### **Section I. Proposed Exemption for the Purchase of Fund Shares With Assets Transferred in Kind From a Plan Account**

If the exemption is granted, the restrictions of section 406(a) and section

<sup>1</sup> The Department wishes to note that ERISA's general standards of fiduciary conduct would apply to the Purchase by the Funds. In this regard, section 404(a) of the Act requires, among other things, that a plan fiduciary discharge his duties with respect to a plan solely in the interest of the plans' participants and beneficiaries in a prudent fashion.

<sup>2</sup> The Dalys made certain representations concerning the business and the Funds withheld \$20,000 from the sale proceeds in order to assure that the representations were accurate. The escrow was released in four annual installments, which began May 1, 2000, and will end May 1, 2003.

<sup>3</sup> For purposes of this proposed exemption, references to provisions of Title I of the Act, unless otherwise specified, refer also to corresponding provisions of the Code.

406(b) 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 (F) of the Code, shall not apply, effective February 5, 2002, to the purchase of shares of one or more open-end management investment companies (the PIMCO Mutual Funds) registered under the Investment Company Act of 1940 (the ICA), to which PIMCO or any affiliate of PIMCO (the PIMCO Affiliate)<sup>4</sup> serves as investment adviser and may provide other services, by an employee benefit plan (the Plan or Plans), whose assets are held by PIMCO, as trustee, investment manager or discretionary fiduciary, in exchange for securities held by the Plan in an account (the Account) or sub-Account with PIMCO (the Purchase Transaction), provided that the following conditions are met:

(a) A fiduciary who is acting on behalf of each affected Plan and who is independent of and unrelated to PIMCO, as defined in paragraph (g) of Section III below (the Second Fiduciary), provides, prior to the first Purchase Transaction, the written approval described in paragraph (b) or (c) of this Section I, as applicable, following the disclosure of written information concerning the PIMCO Mutual Funds, which includes the following:

(1) A current prospectus or offering memorandum for each PIMCO Mutual Fund which has been approved by the Second Fiduciary for that Plan's Account;<sup>5</sup>

(2) A statement describing the fees to be charged to, or paid by, the Plan and the PIMCO Mutual Funds to PIMCO, including the nature and extent of any differential between the rates of the fees paid by the PIMCO Mutual Fund and the rates of the fees otherwise payable by the Plan to PIMCO;

(3) A statement of the reasons why PIMCO considers Purchase Transactions to be appropriate for the Plan;

(4) A statement on whether there are any limitations on PIMCO with respect to which Plan assets may be invested in the PIMCO Funds, and if so, the nature of such limitations;

<sup>4</sup> Unless otherwise noted, "PIMCO" refers to "PIMCO" and to any "PIMCO Affiliates" and the term "PIMCO Mutual Funds" refers to any registered investment funds that are managed or advised by PIMCO or a PIMCO Affiliate.

<sup>5</sup> In the case of a private placement memorandum, such memorandum must contain substantially the same information that would be disclosed in a prospectus if the offering of the securities were made in a registered public offering under the Securities Exchange Act of 1933 (the 1933 Act). In the Department's view, the private placement memorandum must contain sufficient information to permit Second Fiduciaries to make informed investment decisions.

(5) In the case of a Plan having total assets that are less than \$200 million, the identity of all securities that are deemed suitable by PIMCO for transfer to the PIMCO Mutual Funds; and

(6) Upon such Second Fiduciary's request, copies of the proposed and final exemptions pertaining to the exemptive relief provided herein for Purchase Transactions occurring after the date of the final exemption.

(b) On the basis of the foregoing information, in paragraph (a) of this Section I, the Second Fiduciary of a Plan having total assets that are at least \$200 million, gives PIMCO a standing written approval (subject to unilateral revocation by the Second Fiduciary at any time) for—

(1) The Purchase Transactions, consistent with the responsibilities, obligations, and duties imposed on fiduciaries by Part 4 of Title I of the Act;

(2) The investment guidelines for the Account (the Strategy) and the management, by PIMCO, of client Plan assets in separate Accounts in the implementation of the Strategy;

(3) The investment of a certain portion (or portions) of the Accounts in specified PIMCO Mutual Funds, as part of PIMCO's ongoing implementation of the Strategy;

(4) The acquisition of shares of PIMCO Mutual Funds in cash or in kind, from time to time; and

(5) The receipt of confirmation statements with respect to the Purchase Transactions in the form of written reports to the Second Fiduciary.

(c) On the basis of the foregoing information in paragraph (a) of this Section I, the Second Fiduciary of a Plan having total assets that are less than \$200 million, gives PIMCO—

(1) A standing written approval (subject to unilateral revocation by the Second Fiduciary at any time) for—

(i) The Strategy and the management, by PIMCO, of client Plan assets in separate Accounts in the implementation of the Strategy;

(ii) The investment of a certain portion (or portions) of the Accounts in specified PIMCO Mutual Funds, as part of PIMCO's ongoing implementation of the Strategy; and

(iii) The acquisition of shares of PIMCO Mutual Funds in cash or in kind, from time to time.

(2) Advance written approval for—

(i) Each Purchase Transaction, consistent with the responsibilities, obligations and duties imposed on fiduciaries by Part 4 of Title I of the Act; and

(ii) The receipt of confirmation statements with respect to Purchase

Transactions in the form of written reports to the Second Fiduciary.

(d) No sales commissions or other fees are paid by a Plan in connection with a Purchase Transaction.

(e) All transferred assets are securities for which market quotations are readily available.

(f) The transferred assets consist of assets transferred to the Plan's Account at the direction of the Second Fiduciary.

(g) With respect to assets transferred in kind, each Plan receives shares of a PIMCO Mutual Fund which have a total net asset value that is equal to the value of the assets of the Plan exchanged for such shares, based on the current market value of such assets at the close of the business day on which such Purchase Transaction occurs, using independent sources in accordance with the procedures set forth in Rule 17a-7b under the ICA (Rule 17a-7), as amended from time to time or any successor rule, regulation or similar pronouncement, and the procedures established by the PIMCO Mutual Funds pursuant to Rule 17a-7 for the valuation of such assets. Such procedures must require that all securities for which a current market price cannot be obtained by reference to the last sale price for transactions reported on a recognized securities exchange or NASDAQ be valued based on an average of the highest current independent bid and lowest current independent offer, as of the close of business on the day of the Purchase Transaction determined on the basis of reasonable inquiry from at least two sources that are market makers or pricing services independent of PIMCO.

(h) PIMCO sends by regular mail, express mail or personal delivery or, if applicable, by facsimile or electronic mail to the Second Fiduciary of each Plan that engages in a Purchase Transaction, a report containing the following information about each Purchase Transaction:

(1) A list (or lists, if there are multiple Purchase Transactions) identifying each of the securities that has been valued for purposes of the Purchase Transaction in accordance with Rule 17a-7(b)(4) of the ICA;

(2) The current market price, as of the date of the Purchase Transaction, of each of the securities involved in the Purchase Transaction;

(3) The identity of each pricing service or market maker consulted in determining the value of such securities;

(4) The aggregate dollar value of the securities held in the Plan Account immediately before the Purchase Transaction; and

(5) The number of shares of the PIMCO Mutual Funds that are held by

the Account following the Purchase Transaction (and the related per share net asset value and the aggregate dollar value of the shares received) immediately following the Purchase Transaction.

(Such report is disseminated by PIMCO to the Second Fiduciary by regular mail, express mail or personal delivery, or if applicable, by facsimile or electronic mail, no later than 30 business days after the Purchase Transaction.)

(i) With respect to each of the PIMCO Mutual Funds in which a Plan continues to hold shares acquired in connection with a Purchase Transaction, PIMCO provides the Second Fiduciary with—

(1) A copy of an updated prospectus or offering memorandum for such PIMCO Mutual Fund, at least annually; and

(2) Upon request of the Second Fiduciary, a report or statement (which may take the form of the most recent financial report, the current Statement of Additional Information, or some other statement) containing a description of all fees paid by the PIMCO Mutual Fund to PIMCO.

(j) As to each Plan, the combined total of all fees received by PIMCO for the provision of services to the Plan, and in connection with the provision of services to a PIMCO Mutual Fund in which the Plan holds shares acquired in connection with a Purchase Transaction, is not in excess of “reasonable compensation” within the meaning of section 408(b)(2) of the Act.

(k) All dealings in connection with a Purchase Transaction between a Plan and a PIMCO Mutual Fund are on a basis no less favorable to the Plan than dealings between the PIMCO Mutual Fund and other shareholders.

(l) No Plan may enter into Purchase Transaction with the PIMCO Mutual Funds prior to the date the proposed exemption is published in the **Federal Register**.

(m) PIMCO maintains for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons, as described in paragraph (n) of this Section I, to determine whether the conditions of this proposed 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 PIMCO, the records are lost or destroyed prior to the end of the six year period; and

(2) No party in interest, other than PIMCO, 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 (m) of this Section I.

(n)(1) Except as provided in paragraph (n)(2) of this Section I and

notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (m) of Section I above 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 (the Service), or the Securities and Exchange Commission (the SEC);

(B) Any fiduciary of each of the Plans who has authority to acquire or dispose of shares of any of the PIMCO Mutual Funds owned by such a Plan, or any duly authorized employee or representative of such fiduciary; and

(C) Any participant or beneficiary of the Plans or duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described in paragraph (n)(1)(B) or (C) of this Section I shall be authorized to examine the trade secrets of PIMCO or commercial or financial information which is privileged or confidential.

## **Section II. Availability of Prohibited Transaction Exemption (PTE) 77-4<sup>6</sup>**

Any purchase of PIMCO Mutual Fund shares by a Plan that complies with the conditions of Section I of this proposed exemption shall be treated as a “purchase or sale” of shares of an open-end investment company for purposes of PTE 77-4 and shall be deemed to have satisfied paragraphs (a), (d) and (e) of Section II of PTE 77-4.

## **Section III. Definitions**

For purposes of this proposed exemption,

(a) The term “PIMCO” means Pacific Investment Management Company LLC,

<sup>6</sup>In relevant part, PTE 77-4 (42 FR 18732 (April 8, 1977) permits the purchase and sale by an employee benefit plan of shares of a registered open-end investment company when a fiduciary with respect to such plan is also the investment adviser for the mutual fund. Section II(a) of PTE 77-4 requires that a plan does not pay a sales commission in connection with such purchase or sale. Section II(d) describes the disclosures that are to be received by an independent plan fiduciary. For example, the plan fiduciary must receive a current prospectus for the mutual fund as well as full and detailed written disclosure of the investment advisory and other fees that are charged to or paid by the plan and the investment company. Section II(e) requires that the independent plan fiduciary approve purchases and sales of mutual fund shares on the basis of the disclosures given.

any successors thereto, and affiliates of PIMCO (as defined in paragraph (b) of this Section III), including Nicholas-Applegate Capital Management, PIMCO Equity Advisers, Cadence Capital Management, NFJ Investment Group, Value Advisors LLC, Allianz of America, Inc., Pacific Specialty Markets LLC, PIMCO/Allianz International Advisors LLC, OpCap Advisors and Oppenheimer Capital, and their existing and future affiliates.

(b) An “affiliate” of a person 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, relative, or partner in any such person; and

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

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

(d) The term “PIMCO Mutual Fund” or “PIMCO Mutual Funds” means any open-end investment company or companies registered under the ICA for which PIMCO serves as investment adviser, administrator, or investment manager. The term is also meant to include a PIMCO Affiliate Mutual Fund in which a PIMCO Affiliate serves as an investment adviser or investment manager.

(e) The term “net asset value” means the amount for purposes of pricing all purchases and redemptions calculated by dividing the value of all securities, determined by a method as set forth in a PIMCO Mutual Fund’s prospectus and statement of additional information, and other assets belonging to each of the portfolios in such PIMCO Mutual Fund, less the liabilities charged to each portfolio, by the number of outstanding shares.

(f) The term “relative” means a relative as that term is defined in section 3(15) of the Act (or a “member of the family” as that term is defined in section 4975(e)(6) of the Code), or a brother, a sister, or a spouse of a brother or a sister.

(g) The term “Second Fiduciary” means a fiduciary of a plan who is independent of and unrelated to PIMCO. For purposes of this exemption, the Second Fiduciary will not be deemed to be independent of and unrelated to PIMCO if—

(1) Such Second Fiduciary directly or indirectly controls, is controlled by, or is under common control with PIMCO;

(2) Such Second Fiduciary, or any officer, director, partner, employee, or relative of such Second Fiduciary is an officer, director, partner, or employee of PIMCO (or is a relative of such persons); or

(3) Such Second Fiduciary directly or indirectly receives any compensation or other consideration from PIMCO for his or her own personal account in connection with any transaction described in this proposed exemption.

If an officer, director, partner, or employee of PIMCO (or a relative of such persons), is a director of such Second Fiduciary, and if he or she abstains from participation in (A) the choice of the Plan's investment manager/adviser; (B) the written authorization provided to PIMCO for the Purchase Transactions; (C) the Plan's decision to continue to hold or to redeem shares of the PIMCO Mutual Funds held by such Plan; and (D) the approval of any change of fees charged to or paid by the Plan, in connection with the transactions described above in Section I, then paragraph (g)(2) of this Section III, shall not apply.

(h) The term "Strategy" refers to the set of investment guidelines that have been established in advance to govern the Account. The Strategy is created by PIMCO in collaboration with the Second Fiduciary of a client Plan and may be mutually amended, from time to time.

### Summary of Facts and Representations

#### *Description of the Parties*

1. PIMCO (i.e., *Pacific Investment Management Company, LLC*), an investment counseling firm located in Newport Beach, California, is a subsidiary of PIMCO Advisors, L.P. (PALP). A controlling interest in PALP is indirectly held by Allianz A.G., a European-based multinational insurance and financial services holding company. An indirect, minority equity interest in PALP is held by Pacific Life Insurance Company, a California-based insurance company.

PIMCO provides investment management and advisory services to the private accounts of institutional clients and to mutual funds, including the separate portfolios of the PIMCO Mutual Funds. PIMCO and its affiliates<sup>7</sup> currently provide the PIMCO Mutual Funds described below with overall investment management services, including, but not limited to, the selection and supervision of investment advisers and regulatory reporting.

<sup>7</sup> Another wholly owned subsidiary of PIMCO, PIMCO Funds Distributors LLC, serves as the principal underwriter and distributor of the PIMCO Mutual Funds.

PIMCO also acts as the dividend disbursing agent with respect to certain classes of shares and as the investment adviser to certain PIMCO Mutual Fund portfolios. PIMCO currently serves as administrator to the PIMCO Mutual Funds and provides the PIMCO Mutual Funds with certain administrative and shareholder services necessary for PIMCO Mutual Fund operations. Additionally, PIMCO is responsible for the supervision of other PIMCO Mutual Fund service providers.

PIMCO also provides investment management and asset allocation services to a variety of clients, including the Plans described below. In the course of implementing each Plan's investment strategy (i.e., the Strategy) and to the extent authorized in the investment management agreement (the Investment Management Agreement) or separate investment guidelines for each Plan, PIMCO may utilize the separate investment portfolios of the PIMCO Mutual Funds as the Plans' investment vehicles.

2. *The Plans* will consist of retirement plans qualified under section 401(a) of the Code which constitute "pension plans" as defined in section 3(2) of the Act, certain welfare plans as defined under section 3(1) of the Act [e.g., voluntary employees' beneficiary association trusts exempt from tax under Code section 501(c)(9)]; and/or "plans" as defined in section 4975(e)(1) of the Code, and with respect to which PIMCO serves or will serve as an investment manager. The Plans will not include employee benefit plans that are sponsored by PIMCO or its affiliates. As a precondition to participating in the Purchase Transactions that are described herein, each Plan will have total assets of at least \$100 million.

3. *The PIMCO Mutual Funds* to which the requested exemption will cover consist of investment companies registered under the ICA. A representative group of PIMCO Mutual Funds which have been currently authorized by the Plans adopting one or more Strategies is the Private Account Portfolio Series (the Private Account Portfolios), which is a subset of the Pacific Investment Management Series (otherwise referred to as "the PIMS Trust"). The Private Account Portfolios are being offered to institutional investors. Any Plan investments in the Private Account Portfolios (or any other PIMCO Mutual Fund offered for the purpose of Purchase Transactions described herein) will be subject to the terms and conditions of this exemption.

The Private Account Portfolios invest at least 65 percent of their assets in bonds or debt securities, including, but

not limited to, securities issued or guaranteed by the U.S. Government; corporate debt of U.S. and non-U.S. issuers; asset-backed securities; and notes, repurchase agreements and other obligations of governmental issuers. The Private Account Portfolios currently consist of the following 16 separate mutual funds:

- Short-Term Portfolio
- Short-Term Portfolio II
- U.S. Government Sector Portfolio
- U.S. Government Sector Portfolio II
- Mortgage Portfolio
- Mortgage Portfolio II
- Investment Grade Corporate Portfolio
- Real Return Bond Portfolio
- Asset-Backed Securities Portfolio
- Asset-Backed Securities Portfolio II
- High Yield Portfolio
- Municipal Sector Portfolio
- International Portfolio
- Short-Term Emerging Markets Portfolio
- Emerging Markets Portfolio
- Select Investment Portfolio

These PIMCO Mutual Funds pay PIMCO an annualized advisory fee of 0.02 percent in return for providing investment advisory services. Aside from the Private Account Portfolios, PIMCO also proposes that the Purchase Transactions contemplated herein will also apply to PIMCO Mutual Funds that are equity mutual funds.

5. PIMCO also serves as the administrator of all of the PIMCO Mutual Funds and it receives an annualized administrative fee from the PIMCO Mutual Funds under a fixed fee structure. For example, in the case of the Private Account Portfolios, PIMCO receives an annualized administrative fee ranging from 0.028 percent for the Real Return Bond Portfolio to 0.04 percent for the International Portfolio. In return for these fixed fees, PIMCO provides administrative services for shareholders of the Private Account Portfolios and it also bears certain costs of various third party services such as audits, custodial services, portfolio accounting, as well as legal, transfer agency and printing costs.<sup>8</sup>

<sup>8</sup> At the present time, PIMCO represents that it does not know how many PIMCO Mutual Funds it will offer to client Plans. PIMCO notes that its fee structure for the Private Account Portfolios is not unusual given the fact that the client Plans pay a Plan-level investment advisory fee based on the amount of assets managed for them by PIMCO. Because PIMCO manages many large client Plans, which place a minimum of \$600 million with PIMCO, the size of the Plan-level investment advisory fees will vary in inverse proportion to the size of the client Plan's Account with PIMCO. As noted in Representation 12 of the proposed exemption, PIMCO will utilize the fee crediting mechanism described in PTE 77-4 to offset its Fund-level investment advisory fees from its Plan-level investment advisory and/or management fees.

As both administrator and investment adviser of the PIMCO Mutual Funds, PIMCO makes overall investment decisions with respect to the assets of each PIMCO Mutual Fund's investment program.

6. The PIMCO Mutual Funds are offered and sold in full compliance with regulations promulgated by the SEC. As mandated by the SEC, shareholders of the PIMCO Mutual Funds receive the following disclosures concerning the PIMCO Mutual Funds:

(a) A copy of the prospectus or offering memorandum, which is updated at least annually; (b) an annual report containing audited financial statements of the PIMCO Mutual Funds and information regarding the PIMCO Mutual Funds' performance (unless such performance is included in the prospectus for the PIMCO Mutual Funds); and (c) a semi-annual report containing unaudited financial statements. With respect to the Plans, PIMCO or National Financial Data Services, Inc., the transfer agent for the PIMCO Mutual Funds, reports all transactions involving shares of the PIMCO Mutual Funds in periodic account statements provided to each Plan's trustee or custodian bank.

As indicated above in the operative language, PIMCO requests that the exemption cover Purchase Transactions involving the Private Account Portfolios as well as other ICA-registered mutual funds that are advised by PIMCO, in which Plans invests. (As noted above, these PIMCO Mutual Funds may also include equity mutual funds.) Similarly, PIMCO requests that the exemption cover Purchase Transactions involving PIMCO Affiliate Mutual Fund shares by client Plans whose assets are managed by investment managers which are PIMCO Affiliates, such as Applegate Capital Management, PIMCO Equity Advisors, Cadence Capital Management, NFJ Investment Group, Value Advisors LLC, Allianz of America, Inc., Pacific Specialty Markets LLC, PIMCO/Allianz International Advisors LLC, OpCap Advisors or Oppenheimer Capital.<sup>9</sup>

If granted, the proposed exemption will be effective as of the date the notice of proposed exemption is published in the **Federal Register** such that no Plan may enter into Purchase Transaction with the PIMCO Mutual Funds prior to this time.

<sup>9</sup> As noted in the operative language of this proposed exemption, unless otherwise stated, references to "PIMCO" or to a "PIMCO Mutual Fund" refer also to a "PIMCO Affiliate" or to a "PIMCO Affiliate Mutual Fund."

#### *PIMCO's Investment Strategy*

7. As noted above, PIMCO serves as investment manager to certain Plans. PIMCO will consult with a Second Fiduciary of the Plan to develop an investment strategy, which is then approved and adopted by the Second Fiduciary to serve as the investment guidelines for the investment of a Plan Account.

According to PIMCO, the term "Strategy" refers to the set of investment guidelines that have been established in advance to govern an Account. The Strategy is created by PIMCO, in collaboration with the Second Fiduciary of a client Plan and may be unilaterally amended, from time to time.

The development of the Strategy will include the selection of broad asset classes and the designation of a percentage of Plan assets to be allocated among such broad asset classes by use of separate Plan Accounts. For example, a Plan may desire to allocate 10 percent of its total assets for investment in global funds under PIMCO's management. Therefore, the Plan will transfer 10 percent of its assets to a Global Bond Account with PIMCO that is designed only to invest in such assets, and at the same time indicate how much of that Account may be invested in PIMCO Mutual Funds with the same investment focus. Later or at the same time, the Plan may establish other Accounts with PIMCO with a different investment focus, i.e., Stable Value, High Yield, Total Return, etc. Thus, any Plan may have more than one Account governed by the Strategy. Such investments will be carried out in accordance with PTE 77-4.

The Strategy can only be modified with the approval of the Second Fiduciary. While a Plan may retain PIMCO to manage various Accounts separately (even though they all may be governed by the Strategy), the fee for all such management services is included within PIMCO's Plan-level investment management fee.

#### *Implementation of the Strategy*

8. The Strategy will be implemented by PIMCO in various situations. In the case of a new client Plan, PIMCO may be asked to take over an existing portfolio of securities, and that portfolio will have already been created by some other investment manager fiduciary using an asset allocation strategy developed by the Plan's in house fiduciaries or outside consultants.

Another situation will occur when an existing client Plan allocates additional assets to PIMCO as investment manager for an Account. Further, a Second

Fiduciary of an existing client Plan may transfer additional assets to a new sub-Account established specifically for the purpose of investing in a particular Strategy (i.e., adding new asset classes). If a Plan retains PIMCO to manage only its International Account, the Strategy will provide for allocation solely among international mutual funds.

The Second Fiduciary may decide later to expand the scope of PIMCO's management authority to include total return fixed income mutual funds, in which case, PIMCO will establish a sub-Account for the purpose of investing in the total return fixed income Strategy. At a later date, the Second Fiduciary may decide to retain PIMCO to manage mortgage-backed securities.

In each of the foregoing situations, PIMCO will not become a fiduciary until after the Second Fiduciary has specified which portion of the Plan's assets (including which specific assets and which specific PIMCO Mutual Funds may be authorized for investment) will be allocated to a sub-Account under PIMCO's management. Having obtained the initial authorization of the Second Fiduciary, however, PIMCO will invest the assets of the client Plan, from time to time, among the PIMCO Mutual Funds which the Second Fiduciary has authorized.

Also, in each of the above situations, the client Plan's existing portfolio of securities frequently may include securities that are suitable for investment by the PIMCO Mutual Funds. PIMCO believes that it may be appropriate, in such cases, to transfer these securities in kind, directly to the relevant PIMCO Mutual Funds in order to avoid transaction costs and potential market disruption that may occur from a sale of those securities by the Plan and the subsequent repurchase of those securities by the PIMCO Mutual Funds. Plan securities which are compatible with the investment guidelines for the PIMCO Mutual Funds, and which can be transferred in compliance with procedures adopted by such Funds, will be transferred in kind to the PIMCO Mutual Funds in exchange for Fund shares, pursuant to prior client authorization of the Plans investment in such Funds. Any securities which are not transferred in kind will continue to be held and actively-managed by PIMCO, as directed by the client Plan's Second Fiduciary, outside of the PIMCO Mutual Funds in a separate account maintained such Plan.

9. PIMCO maintains that the in kind transfers of Account assets in exchange for shares of the PIMCO Mutual Funds will be ministerial transactions performed in accordance with pre-



established objective procedures which are approved by the Board of Trustees of the PIMS Trust. Such procedures require that assets transferred to a PIMCO Mutual Fund (a) be consistent with the investment objectives, policies and restrictions of the corresponding portfolios of the PIMCO Mutual Fund, as determined by PIMCO; (b) satisfy the applicable requirements of the ICA and the Code; and (c) have a readily ascertainable market value, as determined pursuant to SEC Rule 17a-7. Further, a Second Fiduciary for each Plan will be required to give PIMCO prior written authorization and approve the transfer of the Plan's assets to the PIMCO Mutual Funds (which Funds have been approved for investment by the Plan's Account), and the transfer of such assets on an in kind basis.

Although PIMCO intends that multiple Purchase Transactions will occur per Plan, after each transaction is completed, PIMCO will continue to manage the Account in accordance with the exemptive relief provided under PTE 77-4. In order to implement the Strategy for each Account (and various sub-Accounts), PIMCO will be guided by its investment process in its management of the Accounts.

#### *Advance Disclosure/Approval*

10. Under the Investment Management Agreement, a Second Fiduciary will receive all of the disclosures required by PTE 77-4. In this regard, such information includes, but is not limited to, (a) a current prospectus or offering memorandum for each PIMCO Mutual Fund which has been approved by the Second Fiduciary for that Plan's Account; (b) a statement describing the fees to be charged to, or paid by, the Plan and the PIMCO Mutual Fund to PIMCO, including the nature and extent of any differential between the rates of the fees paid by the such Fund and the rates of the fees otherwise payable by the Plan to PIMCO; (c) a statement of the reasons why PIMCO considers Purchase Transactions to be appropriate for the Plan; (d) a statement on whether there are any limitations on PIMCO with respect to which Plan assets may be invested in the PIMCO Mutual Funds; and (e) in the case of a Plan having total assets that are less than \$200 million, the identity of all securities that are deemed suitable by PIMCO for transfer to the PIMCO Mutual Funds. In addition, PIMCO will provide copies of the proposed and final exemptions to the Second Fiduciary, upon such fiduciary's request.

Based on these disclosures, the Second Fiduciary of a Plan having total

assets that are at least \$200 million, by executing the Investment Management Agreement, will give PIMCO a standing written approval, which will be unilaterally revocable by such Second Fiduciary at any time. Such standing written approval will apply to all future Purchase Transactions that involve the transfer of a Plan's assets to the corresponding PIMCO Mutual Funds in exchange for shares, as appropriate, and PIMCO's receipt of fees for providing services to the PIMCO Mutual Funds. Further, the Second Fiduciary will approve (a) the Strategy for the Account and the management of client Plan assets in separate Accounts in the implementation of such Strategy; (b) the investment of a certain portion or portions of the Accounts in specified PIMCO Mutual funds, as part of the ongoing implementation of the Strategy;<sup>10</sup> (c) the acquisition of shares of PIMCO Mutual Funds in cash or in kind, from time to time; and (d) the receipt of confirmation statements with respect to the Purchase Transactions in the form of written reports to the Second Fiduciary.

In the case of a Plan having total assets that are less than \$200 million, the Second Fiduciary will also give PIMCO standing written approval, which will be unilaterally revocable by the Second Fiduciary at any time, and will similarly apply to all future Purchase Transactions. However, such standing approval will cover (a) the Strategy and the management, by PIMCO, of client Plan assets in separate Accounts in the implementation of such Strategy; (b) the investment of a certain portion (or portions) of the Accounts in specified PIMCO Mutual Funds, as part of PIMCO's ongoing implementation of such Strategy; and (c) the acquisition of shares of PIMCO Mutual Funds in cash or in kind, from time to time. In addition, the Second Fiduciary will be required to provide PIMCO with written approval, prior to each Purchase Transaction, with respect to such transaction, consistent with the responsibilities, obligations and duties imposed on fiduciaries by part 4 of Title I of the Act.

Moreover, the Second Fiduciary will be required to authorize the receipt of confirmation statements from PIMCO, with respect to Purchase Transactions, in the form of written reports to such Second Fiduciary.

Under either Plan size scenario, if the Second Fiduciary does not approve the use of the PIMCO Mutual Funds as Plan

investments, it will not allow PIMCO the investment discretion to invest in the PIMCO Mutual Funds.

#### *Valuation Procedures*

11. The assets transferred by an Account to the Funds in connection with a Purchase Transaction will consist of securities for which there is a recognized market. The value of the securities to be transferred in kind from an Account in such Purchase Transactions will be determined based on market value as of the close of business on the day of the Purchase (the Account Valuation Date). The current market price for specific types of Account securities transferred to the PIMCO Mutual Funds in exchange for shares in a Purchase Transaction on the Account Valuation Date will be determined in a single valuation using the valuation procedures described in Rule 17a-7 under the ICA as follows:

(a) If the security is a "reported security," as the term is defined in Rule 11Aa3-1 under the Securities Exchange Act of 1934 (1934 Act), the last sale price with respect to such security reported in the consolidated transaction reporting system (the Consolidated System) for the Account Valuation Date; or if there are no reported transactions in the Consolidated System that day, the average of the highest current independent bid and the lowest current independent offer for such security (reported pursuant to Rule 11Ac1-1 under the 1934 Act), as of the close of business on the Account Valuation Date; or

(b) If the security is not a reported security, and the principal market for such security is an exchange, then the last sale on such exchange on the Account Valuation Date; or if there is no reported transaction on such exchange that day, the average of the highest current independent bid and lowest current independent offer on such exchange as of the close of business on the Account Valuation Date; or

(c) If the security is not a reported security and is quoted in the NASDAQ system, then the average of the highest current independent bid and lowest current independent offer reported on Level 1 of NASDAQ as of the close of business on the Account Valuation Date; or

(d) For all other securities, the average of the highest current independent bid and lowest current independent offer as of the close of business on the Account Valuation Date, determined on the basis of reasonable inquiry. For securities in this category, PIMCO intends to obtain quotations from at least two sources that are broker-dealers or pricing services independent of and unrelated to PIMCO, using the average of the quotations to value the securities, in conformance with interpretations by the SEC and practice under Rule 17a-7.<sup>11</sup>

<sup>10</sup> It is represented that the parameters of such blanket approval will be documented by letter agreement between PIMCO and the Plan.

<sup>11</sup> Securities of non-U.S. issuers may be traded on U.S. exchanges or the NASDAQ, directly or in the form of ADRs, or may be acquired on foreign



In addition, if the asset is a short-term investment having a maturity of 60 days or less, the asset will be valued at its amortized cost.<sup>12</sup> If the asset is an exchange traded option or an option on a future, the asset will be valued at the settlement price determined by the exchange.<sup>13</sup> Securities and assets originally valued in currencies other than the U.S. dollar will be converted to U.S. dollars using exchange rates obtained from independent pricing services.

The Account securities received by a transferee PIMCO Mutual Fund in a Purchase Transaction will be valued by such portfolio for purposes of the transfer in the same manner and as of the same day as such securities will be valued by the corresponding transferor Account. The value per share of the PIMCO Mutual Funds issued to the Accounts will be based on the net asset value per share of such PIMCO Mutual Fund.<sup>14</sup>

Rule 17a-7 (or the Rule) of the ICA requires a mutual fund registered under the ICA to adopt procedures reasonably designed to ensure that all transaction with such mutual fund have satisfied the conditions of the Rule. The board of directors of such registered mutual fund must, on a quarterly basis, review all transactions conducted under the Rule

and make a determination that all such purchases or sales made during the quarter have complied with the procedures adopted by such fund.

As required by the Rule, reports will be prepared and presented to the board of directors of any PIMCO Mutual Fund that has engaged in transactions covered by such Rule. In addition, PIMCO will provide the reports (with respect to Purchase Transactions affecting the client Plan's Account) to any Second Fiduciary of a client Plan which has engaged in a Purchase Transaction with a PIMCO Mutual Fund during the period in question. Such reports will be disseminated by PIMCO to Second Fiduciaries of client Plans by regular mail, express mail or personal delivery, or if applicable, by facsimile or electronic mail, no later than 30 business days after the Purchase Transaction.

The reports will serve both a confirmation and reporting function. Such reports will contain the following information: (a) A list (or lists, if there are multiple Purchase Transactions) identifying each of the securities that was valued for purposes of the Purchase Transaction in accordance with Rule 17a-7(b)(4) of the ICA; (b) the current market price, as of the date of the Purchase Transaction, of each of the securities involved in the Purchase Transaction; (c) the identity of each pricing service or market maker consulted in determining the value of such securities; (d) the aggregate dollar value of the securities held in the Plan Account immediately before the Purchase Transaction; and (e) the number of shares of the PIMCO Mutual Funds that are held by the Account following the Purchase Transaction (and the related per share net asset value and the aggregate dollar value of the shares received) immediately following the Purchase Transaction.

#### *PIMCO's General Compliance with PTE 77-4*

12. As noted above, it is anticipated that the Purchase Transactions will occur not only when a new client Plan retains PIMCO as a discretionary fiduciary under the Investment Management Agreement in connection with an existing portfolio of assets, but where PIMCO, while implementing a Strategy for an ongoing client Plan, determines that it is appropriate to invest Plan assets in the PIMCO Mutual Funds under the terms of PTE 77-4. Any individual Plan (or Plan sponsor) that retains PIMCO as an investment manager will pay directly to PIMCO a Plan-level investment management fee in exchange for all investment

management services provided to it by PIMCO. PIMCO's fee is usually based on a percentage of the market value of assets under management. For example, if a Plan Account has less than \$600 million in aggregate assets, PIMCO's investment management fee will be computed as follows: 0.50 percent on the first \$25 million, 0.375 percent on the next \$25 million and 0.25 percent thereafter. If the Account has total assets that are in excess of \$600 million, PIMCO's investment management fees will reflect 0.25 percent on the first \$600 million, 0.20 percent on the next \$700 million and 0.15 percent thereafter.

In addition, certain of PIMCO's fee schedules may include incentive-based fee structures, if agreed to by the client Plan's Second Fiduciary.<sup>15</sup> Under a typical incentive fee arrangement, PIMCO will earn its annual base fee of 20 basis points. Thereafter, PIMCO will earn an additional 20 percent of the excess of an Account's performance over a designated independent index, such as the Lehman Aggregate Bond Index.

Further, client Plans may request customized products and services, and fees for such services may be separately negotiated. As mentioned above, the size of the fee will vary in inverse proportion to the size of the Plan's Account with PIMCO. Fees are normally paid on a quarterly basis, with some accounts being billed during the quarter for services which are provided, using the asset value at the beginning of the quarter. However, the periods over which fees are calculated and their method of payment will be negotiated in advance and will depend upon the requirements of the individual client.

With respect to any Plan with assets invested in the PIMCO Mutual Funds, PIMCO follows PTE 77-4, under which all investment advisory fees payable to PIMCO by the PIMCO Mutual Funds (currently, 0.02 percent for the Private Account Portfolios) that are attributable to that Plan's investment in the PIMCO Mutual Funds are credited against such Plan's Plan-level investment management fees. The net result of the

<sup>15</sup> PIMCO represents that if the Plan-level investment management fees includes an incentive fee which is calculated and payable to it or to the PIMCO Affiliates, such fee will be in accordance with advisory opinions issued by the Department to Batterymarch Financial Management (see ERISA Advisory Opinion 86-20A, August 29, 1986); BDN Advisers, Inc. (see ERISA Advisory Opinion 86-21A, August 29, 1986); and Alliance Capital Management Corporation (see ERISA Advisory Opinion 89-28A, September 25, 1989). However, in this proposed exemption, the Department expresses an opinion on whether the PIMCO's contemplated fee arrangements are in compliance with the aforementioned advisory opinions.

exchanges or foreign over-the-counter markets. In the latter case, valuation will be in accordance with Representation 11 above.

<sup>12</sup> In PTE 96-54 (61 FR 37933, July 22, 1996), involving the Wells Fargo Bank, N.A. (Wells Fargo), the "amortized cost" method referred to an approach to valuing debt securities that were recognized in different contexts by various regulatory agencies and accounting standard boards. Wells Fargo noted that the amortized cost method is a permitted, rather than required, valuation approach and that the term also refers to the value of a security derived from the methodology. For example, Wells Fargo explained that the SEC's "Codification of Financial Policies," describes in detail the use of the amortized cost methodology and recognizes that a mutual fund's board of directors may determine in good faith that, except in unusual circumstances, amortized cost approximates the fair market value of debt securities with remaining maturities of 60 days or less (based on the cost for securities acquired within 60 days of maturity or fair market value on the 61st day prior to maturity for securities already owned). PIMCO represents that it concurs with Wells Fargo's understanding of the amortized cost method.

<sup>13</sup> PIMCO represents that trading in options and futures on options are among the strategies typically employed by managers of fixed income mutual funds, such as the Private Account Portfolios. Any options not traded on an exchange will be valued in the same manner as other securities which are not traded on an exchange. In addition, PIMCO notes that settlement prices for the options are continuously available during the trading day for exchange-traded options.

<sup>14</sup> For purposes of pricing purchases, net asset value is determined by dividing the value of all securities and assets of each portfolio, less the liabilities charged to each portfolio, by the number of each portfolio's outstanding shares.

credit to the Plan is that, with respect to any Plan investments, PIMCO receives only a Plan-level investment management fee. Therefore, the investment of Plan assets in the PIMCO Mutual Funds will not result in additional investment management fees to PIMCO or to the PIMCO Affiliates.<sup>16</sup>

PIMCO may also receive other Fund-level fees for administrative, transfer, accounting, and other secondary services (the Secondary Services)<sup>17</sup> provided to a PIMCO Mutual Fund or to the distributor of shares of the PIMCO Mutual Funds and its affiliates. However, no such fees will be paid to PIMCO pursuant to a 12b-1 Plan. PIMCO represents that the trustees of the PIMCO Mutual Funds and the shareholders of such Funds approve the compensation that PIMCO receives from the PIMCO Mutual Funds. In addition, the trustees of the PIMCO Mutual Funds approve any changes in the compensation paid to PIMCO for services rendered to the PIMCO Mutual Funds.

Currently, PIMCO credits all or a portion of the Fund-level fees it receives from the Private Account Portfolios for Secondary Services that are administrative in nature to the participating Plans in the same manner as PIMCO credits back its Fund-level advisory fees. For certain of these PIMCO Mutual Funds, PIMCO is retaining a portion of such administrative fees in accordance with the Department's advisory opinions involving PNC Financial Corp. (ERISA Advisory Opinion 93-12A, April 27, 1993) and the Frank Russell Company (ERISA Advisory Opinion 93-13A, April 27, 1993).<sup>18</sup>

Finally, PIMCO represents that the combined total of all Plan-level and Fund-level fees received by PIMCO for the provision of services to such Plans and to the PIMCO Mutual Funds, respectively, is not in excess of

“reasonable compensation” within the meaning of section 408(b)(2) of the Act.

#### *Conditions for Exemption*

13. If granted, this proposed exemption will be subject to the satisfaction of certain conditions that will further protect the interests of the Plans. For example, the proposed Purchase Transactions are subject to the prior written authorization of an independent Second Fiduciary, acting on behalf of each of the Plans, who has been provided with full and written disclosure by PIMCO. The Second Fiduciary will generally be the administrator, sponsor, or a committee appointed by the sponsor to act as a named fiduciary for a Plan.

With respect to disclosure, the Second Fiduciary of such Plan will receive full and written disclosure of information concerning the PIMCO Mutual Funds as set forth in the Investment Management Agreement, including (a) a current prospectus or offering memorandum (containing the same information as the prospectus for securities registered under the 1933 Act) for each PIMCO Fund to which the Plan's assets may be transferred; (b) a statement describing the fees to be charged to, or paid by, the Plan and the PIMCO Mutual Funds to PIMCO, including the nature and extent of any differential between the rates of the fees paid by the Fund and the rates of the fees otherwise payable by the Plan to PIMCO; (c) a statement of the reasons why PIMCO considers Purchase Transactions to be appropriate for the Plan; (d) a statement on whether there are any limitations on PIMCO with respect to which Plan assets may be invested in the Funds, and if so, the nature of such limitations; and (e) in the case of a Plan having total assets that are less than \$200 million, the identity of all securities that are deemed suitable by PIMCO for transfer to the PIMCO Mutual Funds.

On the basis of the information disclosed, the Second Fiduciary, in the Investment Management Agreement for a client Plan, or in separate Investment Guidelines provided to PIMCO, will authorize in writing the investment of assets of the Plans in shares of the PIMCO Mutual Funds in connection with the Purchase Transactions set forth herein and the compensation received by PIMCO in connection with its services to the PIMCO Mutual Funds. The Second Fiduciary's written authorization will extend to those portfolios of the PIMCO Mutual Funds that are specifically referenced in the Plan's Investment Management Agreement with PIMCO or in separate Investment Guidelines given to PIMCO

by the client Plan. (As noted above in Representation 10, such authorization by the Second Fiduciary may include either blanket approval or transactional approval, depending upon the size of the Plan.) Having obtained the authorization of the Second Fiduciary, PIMCO will invest the assets of a Plan, from time to time, among such portfolios of the PIMCO Mutual Funds and in the manner provided in the Investment Management Agreement and the Strategy, subject to satisfaction of the other terms and conditions of this proposed exemption.

In addition to the disclosures provided to the Plan prior to investment in any of the PIMCO Mutual Funds, PIMCO will routinely provide at least annually to the Second Fiduciary of the Plan, updated prospectuses of the PIMCO Mutual Funds or offering memoranda in accordance with the requirements of the ICA and the SEC rules promulgated thereunder. Further, the Second Fiduciary of a Plan will be supplied, upon request, with a report or statement (which may take the form of the most recent financial report of the PIMCO Mutual Funds, the current statement of additional information (or offering memoranda supplement), or some other written statement) which contains a description of all fees paid by the PIMCO Mutual Fund to PIMCO.

In addition to the disclosures provided to the Plan prior to investment in any of the PIMCO Mutual Funds, it is represented that (a) Plans and other investors will purchase or redeem shares in the Funds in accordance with standard procedures adopted by each Fund's board of directors; (b) Plans will pay no sales commissions, redemption fees, or Rule 12b-1 Fees in connection with purchase or redemption of shares in the Funds by the Plans; (c) PIMCO will not purchase from or sell to any of the Plans shares of any of the Funds; (d) PIMCO will maintain for a period of six years, in a manner that is capable for audit and examination, records necessary to enable certain designated persons, such as Plan fiduciaries, Plan participants, or duly authorized employees or representatives of the Department, the Service or the SEC, to determine whether the conditions of the exemption have been met; (e) all dealings in connection with a Purchase Transaction will be on a basis that is no less favorable to a Plan than dealings between the PIMCO Mutual Fund and other shareholders; and (f) the price paid or received by the Plans for shares of the Funds will be the net asset value per share at the time of such purchase or redemption and will be the same

<sup>16</sup> The total annual operating expenses of the portfolios for the PIMCO Mutual Funds are set forth in the offering materials and disclosures given to Plan clients in connection with an investment in such Funds. As noted above, the Private Account Portfolios of the PIMCO Mutual Funds impose an annualized administrative fee, which currently ranges (after appropriate credits) from 0.028 percent for the Real Return Bond Portfolio to 0.04 percent for the International Portfolio.

<sup>17</sup> The term “Secondary Service” means a service, other than an investment management, investment advisory or similar service which is provided by PIMCO to the Funds, including, but not limited to, custodial, accounting, administrative, or legal services.

<sup>18</sup> PIMCO represents that the PIMCO Mutual Fund portfolios for which it presently credits back fees for Secondary Services are the Short-Term Fund, the Short-Term II Fund, the U.S. Government Sector II Fund, the Mortgage Fund, the Mortgage II Fund, and the Investment Grade Corporate Fund.

price as any other investor would have paid or received at that time.

The value of the Funds' shares and the value of each Funds' portfolios are determined on a daily basis. Assets are valued at fair market value, as required by Rule 17a-7.<sup>19</sup> Net asset value per share, for purposes of pricing purchases and redemptions, is determined by dividing the value of all securities and other assets of each portfolio, less the liabilities charged to each portfolio, by the number of each portfolio's outstanding shares.

It is represented that the receipt of fees, as described above, is generated by a Plan's investment in the PIMCO Mutual Funds. These investments are the result of purchases of shares with cash and the exchanges of assets of the Plans, including those in Accounts, for shares of the PIMCO Mutual Funds. With respect to such Purchase Transactions, it is represented that Plans and other investors will purchase or redeem shares of the PIMCO Mutual Funds in accordance with standard procedures described in the prospectus (or offering memorandum) for each portfolio of the PIMCO Mutual Funds.

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

(a) Depending upon the size of an investing Plan, a Second Fiduciary has authorized or will authorize, in writing, a Purchase Transaction prior to its consummation either by blanket approval or by transactional approval after such Second Fiduciary has received full written disclosure of information concerning the Plan's investment in a PIMCO Mutual Fund.

(b) Each Plan has received or will receive shares of a PIMCO Mutual Fund, in connection with a Purchase Transaction, that are equal in value to the assets of the Plan exchanged for such shares, as determined in a single valuation performed in the same manner and as of the close of business on the same day in accordance with the procedures set forth in Rule 17a-7 under the ICA, as amended from time to time or any successor rule, regulation or similar pronouncement.

(c) Not later than 30 business days after a Purchase Transaction, a Second Fiduciary of a Plan that has engaged in a Purchase Transaction has received or will receive a report containing the following information: (1) The identity

of each of the securities that was valued for purposes of a Purchase Transaction in accordance with Rule 17a-7(b)(4) of the ICA; (2) the current market price, as of the date of the Purchase Transaction, of each of the securities involved in the Purchase Transaction; (3) the identity of each pricing service or market maker consulted in determining the value of such securities; (4) the aggregate dollar value of the securities held in the Plan Account immediately before the Purchase Transaction; and (5) the number of shares of the PIMCO Mutual Funds that are held by the Account following the Purchase Transaction (and the related per share net asset value and the aggregate dollar value of the shares received) immediately following the Purchase Transaction.

(d) The price that has been paid or received or will be paid or received by the Plans for shares in the PIMCO Mutual Funds is the net asset value per share at the time of the transaction and will be the same price for the shares which will be paid or received by any other investor for shares of the same class at that time.

(e) As to each individual Plan, the combined total of all fees received by PIMCO for the provision of services to a Plan, and in connection with the provision of services to any of the Funds in which the Plan may invest, has not been in excess, nor will be in excess of "reasonable compensation," within the meaning of section 408(b)(2) of the Act.

(f) No sales commissions, redemption fees, or Rule 12b-1 Fees have been paid or will be paid by a Plan in connection with a Purchase Transaction.

(g) With respect to each Purchase Transaction, the Second Fiduciary has received or will receive a full and detailed written disclosure of information concerning a PIMCO Mutual Fund, including a current prospectus and a statement describing the fee structure, and such Second Fiduciary has authorized or will authorize, in writing, the investment of the Plan's assets in the Fund and the fees paid by the Fund to PIMCO.

(h) In accordance with the requirements of PTE 77-4 and advisory opinions issued by the Department thereunder, (1) the Plans have received or will receive a full credit against Plan-level fees of any investment management, investment advisory or similar fees paid to PIMCO with respect to any of the assets of such Plans that are or will be invested in shares of any of the Funds; and (2) PIMCO may retain fees for certain Secondary Services it performs on behalf of the Funds.

(i) PIMCO will provide ongoing disclosures (e.g., updated prospectuses

or offering memoranda) to Second Fiduciaries of Plans so that such fiduciaries may, among other things, verify the fees charged by PIMCO to the PIMCO Mutual Funds.

(j) All dealings between the Plans and any of the PIMCO Mutual Funds have been or will be on a basis that is no less favorable to such Plans than dealings between the PIMCO Mutual Funds and other shareholders holding shares of the same class as the Plans.

#### Notice to Interested Persons

PIMCO represents that because client Plans that may be potentially interested in engaging in the aforementioned Purchase Transactions cannot be identified at this time, the only practical means of notifying the Second Fiduciaries of such Plans is by the publication of this notice of proposed exemption in the **Federal Register**. Therefore, comments and requests for a hearing must be received by the Department no later than 30 days from the date of publication of this notice of proposed exemption 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;

<sup>19</sup> However, if the use of a money market fund is authorized by a client Plan, the assets would instead be valued based on the amortized cost method authorized by SEC Rule 2a-7 in order to maintain the net asset value at \$1.00 per share.

(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 30th day of January, 2002.

**Ivan Strasfeld,**

*Director of Exemption Determinations,  
Pension and Welfare Benefits,  
Administration, U.S. Department of Labor.*  
[FR Doc. 02-2640 Filed 2-4-02; 8:45 am]

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

[Prohibited Transaction Exemption 2002-09; Exemption Application No. D-10984]

#### Grant of Individual Exemptions; Prudential Insurance Company of America (Prudential Insurance)

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

**ACTION:** Grant of individual exemption.

**SUMMARY:** This document contains an exemption issued by the Department of Labor (the Department) 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).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any

interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, 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 proposed to the Secretary of Labor.

#### Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

#### The Prudential Insurance Company of America (Prudential Insurance), Located in Newark, NJ

[Prohibited Transaction Exemption 2002-09; Exemption Application No. D-10984]

#### Exemption

##### Section I. Covered Transactions

The restrictions of section 406(a) 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,<sup>1</sup> shall not apply, effective September 27, 2001, to (1) the receipt of shares of common stock (Common Stock) issued by Prudential Financial, Inc. (Prudential Financial or the Holding Company) or (2) the receipt of cash (Cash) or policy credits (Policy Credits) by any eligible policyholder (the Eligible Policyholder) of Prudential Insurance, which is an employee benefit plan (the Plan), including Plans sponsored by Prudential Insurance and/or its affiliates for the benefit of their own employees

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

(collectively, the Prudential Insurance Plans),<sup>2</sup> in exchange for such Eligible Policyholder's mutual membership interest in Prudential Insurance, pursuant to a plan of conversion (the Plan of Reorganization) adopted by Prudential Insurance and implemented in accordance with section 17:17C-2 of the New Jersey Insurance Law.

In addition, the restrictions of section 406(a)(1)(E) and (a)(2) and section 407(a)(2) of the Act shall not apply, effective September 27, 2001, to the receipt and holding, by the Prudential Welfare Plan, of Common Stock, whose fair market value exceeds 10 percent of the value of the total assets held by such Plan.

This exemption is subject to the general conditions set forth below in Section II.

#### Section II. General Conditions

(a) The Plan of Reorganization is implemented in accordance with procedural and substantive safeguards that are imposed under New Jersey Insurance Law and is subject to review and supervision by the New Jersey Commissioner of Banking and Insurance (the Commissioner).

(b) The Commissioner reviews the terms of any options that are provided to Eligible Policyholders of Prudential Insurance as part of such Commissioner's review of the Plan of Reorganization, and the Commissioner only approves the Plan of Reorganization following a determination that the Plan of Reorganization is fair and equitable to all Eligible Policyholders.

(c) Except as provided below, each Eligible Policyholder has an opportunity to comment on and vote to approve the Plan of Reorganization after full written disclosure of the terms of the Plan of Reorganization is given to such policyholder by Prudential Insurance. As provided under the Plan of Reorganization and approved by the Commissioner,

(1) Eligible Policyholders of policies issued by designated subsidiaries (the Designated Subsidiaries) of Prudential Insurance will not have the opportunity to comment and vote on the Plan of Reorganization, and

(2) Prudential Insurance will be precluded from voting on the Plan of Reorganization where a group policy is issued to Prudential Insurance as trustee for a multiple employer, or similar, trust (the MET).

<sup>2</sup> Unless otherwise noted, references to the term "Plan" are meant to include "outside" Plan policyholders of Prudential Insurance as well as the Prudential Welfare Benefits Plan (the Prudential Welfare Plan).